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In The

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME III, PAGES 531 TO 794

ROBERT S. SMITH
Counsel of Record

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Counsel for Petitioner

TOMMY L. SKAGGS
Counsel of Record

Assistant Attorney
General, State of Texas
P.O. Box 12548,
Capitol Station
Austin, TX 78711-2548
(512) 936-1600

Counsel for Respondent

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CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[50:1704] STANTON SAMENOW

called as a witness by the State, having first been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. PRICE:

Q Would you state your name for the jury, please, Sir?

A Stanton B. Samenow.

Q Where do you live, Mr. Samenow?

A I reside in Falls Church, Virginia.

Q And, what is your occupation or profession?

A Clinical psychologist.

Q Are you a married man?

A Yes, I am.

Q Do you have children?

A Yes, Sir.

Q You say that you are a clinical psychologist. Could you give the jury a general description of your educational background?

A Yes. I have a Bachelor's in Psychology from Yale University, 1963. Master's in Psychology University of Michigan, 1964. Ph.D. from the University of Michigan in Psychology, Clinical Psychology as a specialty, 1968.

Q And, would you just kind of summarize your [1705] work experience work experience since your educational background was completed?

A Yes. After receiving my Ph.D. in 1968, I worked at the University of Michigan, Medical Center and then I worked at Norville State College in the Young Adult Unit. This is a suburb of Detroit. I was Chief Psychologist on that unit and that was approximately a year, until February, 1970. I then, became Clinical Research Psychologist of the St. Elizabeth Hospital in Washington, D.C., in the program for investigation of criminal behavior. I was at St. Elizabeth's from 1970 to mid-1978, and from mid-1978, until the present time, I have had a private practice of psychology in Alexandria, Virginia.

Q In your career, have you had the occasion to write any books?

A Yes, I have.

Q You authored these books, for example?

A Yes, Sir.

Q What books have you written?

A I am co-author of the three-volume set of Criminal Personality.

Q That is the three volume set I have setting up here [1706] in front of me here?

A Yes, it is.

Q Entitled Criminal Personality, is that correct?

A That's correct.

Q What is Volume One pertaining to?

A The first volume is called Criminal Personality, A Profile for Change. Volume Two is called, Criminal Personality, Change Process; and Volume Three is called, Criminal Personality, The Drug User. These were written in corroboration with Dr. Samuel Yochelson, psychiatrist.

Q Were these based on any particular type of resource that you and Dr. Yochelson, performed together?

A They were based on what came to be a seventeen year in depth resource treatment study of male offenders. I say came to be, I was part of that study for approximately eight and a half years and Dr. Yochelson preceded me, starting the study in 1961.

Q Were you there when the study was concluded?

A Yes. Dr. Yochelson died in 1976, and I continued to work, including the writing of the third volume and the conclusion of the project, and then, I [1707] left St. Elizabeth's and I began private practice.

Q What was the date of publication of that three volume set on Criminal Personality, if you recall?

A Volume One, 1976, Volume Two, 1977; third volume, it did not come out to 1986.

Q Okay. Have you written any other books in addition to those three that you co-authored with Yochelson?

A Yes. I was co-author of Inside the Criminal Mind, a book that was published by the Times Book Division of Random House in 1984.

Q Is this the book that I am holding up here?

A Yes, Sir.

Q And, have you written any other books?

A Yes. A book that was published last year, 1989, entitled Before It is Too Late, Why Some Kids Get Into Trouble And What Parents Can Do About It, also, published by Times Books, a Division of Random House.

Q And, that is the book that I am holding up now?

A Yes, Sir.

Q Any other books?

A No, Sir.

Q Have you written any kinds of articles or publications, things of that nature?

A There are a number of articles that have to do with [1708] the area of criminal behavior.

Q Have you also had the opportunity to be a speaker or lecturer or teacher?

A Yes. In addition to having had an adjunct, assistant professorship, actually instructorship at George Washington University, Medical School, I have been since 1977, a teacher in the sense of providing continuing education at professional seminars in nearly every state in this country. I make lengthy, sometimes up to three days worth presentations to law enforcement, correctional,

mental health, social service, educational and others, all having to do with criminal behavior.

Q Have you also in your private practice had an opportunity to deal with the Criminal Justice System?

A Yes. My private practice is largely concerned with forensic psychology, and forensic psychology essentially deals with matters that come from the courts. The work that I do largely is in the area of criminal behavior, also, I do some child custody work, particularly in areas where abuse is alleged to be an issue.

Q Have you ever served on any kind of a task force, or held any kind of an advisory position?

[1709] A Yes. I have been a consultant to a number of agencies, including the Federal Bureau of Investigation, the U.S. Bureau of Prisons, Federal Probation, and a number of other agencies. I was also appointed by the former President Reagan to the Task Force on Law Enforcement in 1980, the Task Force on Victims of Crime in 1982, and as a conferee on the White House Conference for Drug Free America in 1980 – I don't remember the year, I think it was '87.

Q Okay. Do you hold a membership in any professional associations?

A Yes, I do. The American Psychological Association in Virginia, the Psychological Association in the District of Columbia, that is Washington, D.C.; Psychological Association, the Virginia Academy of Clinical Psychologists, the Virginia Juvenile Officers Association, and the Northern Virginia Society of Clinical Psychologists.

Q Are you licensed to practice in any particular state?

A Yes, I am licensed to practice psychology both in Virginia and Washington, D.C.

Q The type of work you do now, is that generally, aside from your testifying and speaking and [1710] lecturing engagements, is that generally limited to your forensic psychology practice?

A Yes, I am virtually on a daily basis, except if I am making presentations out of the area, or on those relatively infrequent occasions when I am not out of town as an expert witness, I do-see both juveniles and both adults, male and female offenders, who are referred to me by a court, by Defense attorneys, by schools and by other agencies. So, my work, really on a day to day basis, has to do with the evaluation and counseling of offenders.

Q You mentioned earlier that you had worked with Dr. Yochelson, is that correct?

A Yes.

Q At St. Elizabeth's Hospital. Can you tell the jury first of all, what is the St. Elizabeth's Hospital or was at that time?

A St. Elizabeth's Hospital is a large psychiatric facility. It was run by the federal government, particularly under the National Institute of Mental Health. It was under the federal offices while I was there. Several years ago, it became a – it was turned over by the government to Washington, D.C., but, in any event, one [1711] division of St. Elizabeth's Hospital that is the Forensic Psychiatry Division, and that does have people who are

sent to St. Elizabeth's for the determination of competency, and it is for determination in insanity defenses, that type of thing, and I should add for clarification that the study that I was a part of, did not simply deal with hospitalized patients. Half the people in this study never were hospitalized. They were offenders, but, they came to us through other agencies.

Q The study that you were involved in there, I believe you testified that you were involved some eight, eight and a half years, is that correct?

A Yes.

Q And, the entire study itself, how long did it take?

A The entire study was from 1961 to 1978, approximately, seventeen years.

Q And, you were there at the conclusion, is that correct?

A Yes.

Q Okay. Is that study a significant study in your area of speciality?

[1712] A Well, I think I can say it is, I hope that will not seem immodest. The reason I say I think, it has been seen over the years as significant, is simply because I had been asked to speak all over the country, repeatedly, to train groups of people who deal with offenders, how to better understand offenders, what are they like, and so, the study itself became a spring board for professional training, professional teaching and there has been interest throughout the country as well as in Canada.

Q What is some of the important aspects of that study? If you can give that to the jury.

A I would say that the – gosh, most definitely, try to be brief. But, there were three aspects of the study. One was to look at what we believe, when we begin the alleged cause of the crime, we were interested in why is criminal behavior, The second aspect was to understand the thinking processes behind criminal behavior; The third part of it was to try and find a way to work with some offenders under certain circumstances to help them change.

Q What did you discover or what did this study show as to the why's if criminal behavior, if [1713] there were any significant findings in that area?

A In terms of the why's, virtually every, single thing that the late Dr. Yochelson and I believed when we began the work, turned out to be in error. We essentially took the view and we believed that people turn to crime largely because of the factors outside themselves, pressure of social conditions, adverse home environment, abuse, bad parents, peer pressure, watching crime on television, and in other words, we saw the source of crime, largely, not totally, as eminating outside the offender. I think you could say an offense, in a sense, we saw the offender as a victim of a force, outside himself. We had an opportunity to spend up to eight thousand hours with some of these people in our study over the entire period of the study, when they were not in legal jeopardy, that is in research, and we found none of those factors that we believe were causes were in fact, necessary or sufficient conditions to explain why.

What we found instead, is we really don't know why. Nobody really knows why anybody embarks on a life of crime, and one that expands [1714] and intensifies. What we did then, was to turn to the thinking, the choices that, that person makes and so, then, what we came up with was a profile of thinking patterns, but, what we did find is that the offender used past adversities to explain away why he did what he did. In other words, he used past problems as justification.

Q As excuses?

A Excuses.

Q But, your findings were to the contrary, but, it was not necessary due to their past history?

A That is correct. Plus the thinking that the crime resides within the individual, he is not just simply a victim of his environment, and when held in the crime of environment, he makes certain choices, maybe in one sense say this, that what we became far more strict than the circumstances that a person comes from, is how he chooses to deal with whatever life hands him.

Q Matter of choice, then?

A Yes, sir.

Q And, do you think then, that comes down even to a criminal as a matter of choice, irregardless of their background?

[1715] A I didn't understand.

Q The criminal, it still comes down to the matter of choice, is that ultimately –

A I would say a series of choices that people make over time.

Q A few weeks ago, did I contact you and in connection with looking over some documentation in this particular case?

A Well, actually, it was June 25th, and Mr. Terry Brown called me.

Q Okay. And, were you forwarded some material concerning this particular case?

A Yes, I was.

Q I will just kind of summarize those materials and see if these are the documents that I sen to you.

The confession of the Defendant that was dated 1979, I believe, two of them. Information concerning 1977 rape conviction involving a Diane Koch. The Defendant's records from Austin State Hospital, University of Texas Medical Branch at Galveston, TDC Medical and Mental Health Records, Mental Health or records from the Polk County Mental Health and Mental Retardation Unit, records from the Mexia State [1716] School, records from the Texas Rehabilitation Commission, the Rusk State Hospital, the Goose Creek Independent School District, Competency and Insanity Examination by Dr. Kenneth A. Vogtsberger, TDC Disciplinary Records on this Defendant, both for his current incarceration and prior incarceration, I believe a Competency Trial Transcript, is that correct?

A Yes, Sir.

Q Are those records that you have there in front of you now?

A Yes, they are.

Q Have you reviewed those documents?

A Yes, I did.

Q Did you memorize all of them?

A No.

Q Okay. Doctor, with respect to your review of the records of Johnny Paul Penry, as well as based upon your prior experience, training and education, I am going to ask you a few questions concerning this matter.

BY MR. SMITH:

Your Honor, can I make an objection at the bench?

BY THE COURT:

[1717] What is your objection?

BY MR. SMITH:

Well, I would object under Estelle v. Smith, the amendments that I cited to Your Honor earlier this morning with respect to Dr. Quijano, and the other basic objections that I cited. I also, if there is any ambiguity he relied on, we would ask for a voir dire to clarify that extension.

BY THE COURT:

You all approach the bench, just a moment.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

I just don't want that to be any problem in the future by establishment, relied on everything including the testimony of Dr. Quijano, relied on Dr. Pebbles' examination back in '77, the TDC stuff, everything that I have been objecting to right along, the Competency Hearing Transcript, all of it.

BY MR. PRICE:

[1718] What now?

BY MR. SMITH:

The transcript of the Competency Hearing.

BY MR. PRICE:

The Penry's testimony from the Competency Trial, 1980, is what I was referring to when I said transcript.

BY MR. SMITH:

Is that all?

BY MR. PRICE:

The other items that he did see that, and he did rely on it. The other items I just went through, He relied, I suppose on all of it.

BY MR. SMITH:

That's all I need. I make the same objection.

BY THE COURT:

Your objection is overruled.

(END OF DISCUSSION HELD AT THE BENCH.)

Q Doctor, with respect to those records, did you learn from reviewing them that the Defendant has been diagnosed with varying degrees of mental retardation over the past, some twenty-f [1719] years?

A Yes, I did, from mild to severe.

BY THE COURT:

Excuse me just a second, Mr. Price. Would you clarify that one transcript that he relied on? There was a little misunderstanding until you came up here. The Competency Transcript?

BY MR. PRICE:

Of 1980.

BY THE COURT:

You need to ask him that.

Q Okay. You did look at the Competency Transcript from 1980?

A Yes, I did.

Q Okay.

BY THE COURT:

Alright. You can go ahead.

Q Likewise, did you notice that he had been subjected to various and sundry forms of IQ test over the years?

A Yes, I did.

Q And, did you notice that those IQ testings varied somewhat in their scores from the moderate to the mild mentally retarded range?

[1720] A Yes.

Q In viewing, generally speaking, the records pertaining to the mental retardation of this individual, was there anything about that, that caused you any kind of a skepticism concerning his condition?

BY MR. SMITH:

Objection for lack of foundation, no showing that man knows anything about the mentally retarded or not.

BY THE COURT:

Restate your question, Mr. Price.

Q Well, with respect to IQ tests, generally, do you use those in your normal everyday practice?

A I wouldn't say everyday. I do give them and I have given quite a number of them over the years.

Q You are familiar generally with what IQ tests are?

A Oh, very much so.

Q And, you have reviewed the IQ tests that were given to the Defendant, over the years, and the one that there was records available for, I guess?

A Yes.

[1721] Q Are IQ tests, generally speaking, the only thing that you rely upon in making a determination of mental retardation?

A I would say this, that IQ tests –

BY MR. SMITH:

I am going to object to the question, Your Honor, need to get the foundation for him making a determination. I would object.

BY THE COURT:

Overrule the objection.

A That IQ tests measurers certain types of intelligence, or certain manifestations of of intelligence. IQ tests are controversial because they do not necessarily measure a person's adaptive skills. In fact, there has been a clammer throughout the professional circles throughout the country I would say without exaggeration, to find other ways, other valid ways of measuring intelligence, other than the long accepted intelligence test. Intelligence takes many forms, is what I am trying to say, so, that IQ tests are not to be the end all of measuring intelligence.

Q When you say adaptive skills, generally, what [1722] are you speaking of there, Doctor?

A Well, I am talking about a person being able even to put together cause and effect, a person being able to read other people, but to develop an understanding of other people. IQ tests taking specifically the two most recently given to Mr. Penry, the Wechsler Intelligence Scale, that is one for children, the Intelligence Scale for Adults or the Sanford Benae, many of these are relying on specific verbal learning vocabulary, information items, even items that don't have anything to do with school learning, but, they are called performance tests, where you may put together blocks to make certain designs, and

even these tests, demand concentration, association, sticking with something that is frustrating, taking time and you can have a person who is able to read other people, who can sustain themselves in the world, but, he may do very poorly on the Wechsler or the Stanford Benae. In other words, people do go to work, and they do live in this world, even with very low scores on IQ tests.

Q Did you, in reviewing all of those records on Mr. Penry, see any background information concern [1723] his adaptive skills?

A Well I would say this –

BY MR. SMITH:

Your Honor, can I have a continuing objection to this line Your Honor, along mental retardation?

BY THE COURT:

Okay. Objection is overruled.

A If I were just to stick with observations that others make who did assess him, there were several occasions that the scores may well be an under-estimate of his intelligence.

For example, when he was tested in 1973, a Carol Pearce, Psychology Intern, said Johnny's social skills may be much higher than his scores indicate. The Stanford Benae administered in 1976, in Angelina County, there is a statement, "This appears to be an under-estimation of his ability." And then, in another statement from the Rusk State Hospital Records, this is in 1973 "The obtained IQ's probably do not accurately reflect the intellectual capacity."

Goose Creek, those are the independent school records that talked about how well – the quote is, "He can redirect his attention unaided. [1724] His oral language is adequate for communication with peers."

It is these sorts of statements, I think, that tend to get at the adaptive skills, social skills, which items on the test themselves which do not necessarily measure.

Q Would planning, the ability to plan and scheme and things of this nature fall into the area of adaptive skills?

A Yes, certainly.

Q Did you see any indication of that in the records that were submitted to you, there on the part of this Defendant?

A Well, yes, even in the particular crime at issue, the rape/homicide of Pamela Mosley Carpenter, there was an idea that was incubated in the mind, that is, there was thinking for three weeks about the individual. There was going to the house, then was planning, checking it out, going around the house. In other words, he indicated in that crime and in other rapes, or attempted rapes, the ability to plan, to think ahead, to consider consequences.

Q Okay. With respect to the rape of Diana Koch, was there any examples there that you saw in the [1725] information furnished to you, of planning and scheming and that ability?

A Yes. From my memory, of what he did there was to convince that lady, that was very significant in picking up strangers, giving a stranger a ride but, he was very convincing that he needed to go to a scene of an accident,

which his brother had essentially been in, and did convince her to give him a ride, got her hooked into that whole story.

Q If the evidence further shows, and I know that you weren't present during her testimony, but, if the evidence further showed that at the conclusion of that escapade, when they were confronted with two other individuals, that had given them a ride, and when she made out cry to those individuals, if he instantly claimed that she was his wife, and she just acted that way, and she kind of through fits and acted that way, from time to time, would that indicate to you any kind of an ability to think on the spur of the moment?

A I would say that it would be a good example of thinking quickly on one's feet.

Q Right.

[1726] A To obtain the objectives that one has in mind.

Q Assume further that the evidence was that they didn't buy that story, and he immediately went into another story, and tried to bribe them by promising to get them some money, would that indicate the same thing?

A Another example of quick thinking, and again, a mind that has had an objective, and if one group doesn't work, one is towarded, one quickly comes up with another idea.

Q Would that fall into the category of adaptive skills that you have been referring to?

A Well, the reason that I am hesitating at adaptive skills, the fact that he was able to do that, with that woman, it is an adaptive skill, but certainly it is an adaptive skill that was used for evil.

Q But, adaptive skills can be used for good or evil?

A That is the capacity to plan, the capacity to think on one's feet, the capacity to think of alternative routes to a particular objective.

Q And, get back down to the choice of the individual then?

A Certainly.

[1727] Q Whether you want to use those adaptive skills for good or evil?

A There is a choice.

Q Did you notice various diagnoses of this Defendant throughout his mental health history?

A Many.

Q Okay. Does that strike you as kind of unusual Doctor?

A No, not really, because he was a very, very puzzling person to the people that confronted him over the years, and so, really, the diagnoses ran – . I won't say that everything that he was termed, that you could term somebody, but, boy there was a long list. Brain damage, psychosis, adjustment reaction, of course, the mental retardation, anti-social personality, and there are many – of such an individual, and people saw different – at different times, and they were certainly puzzled by what

they saw, and I think that has an awful lot to do with the variance of diagnoses.

Q Why do you feel like that there was such a variance there?

A Because I think this man has been involved in many, many different ways, depending upon what [1728] his objective is. There were numerous citations in the record, both I believe in the medical records and the disciplinary records, that if he was angry and if he wanted to lessen the severity of punishment for an infraction, he might threaten to kill himself, so, therefore, he would appear to be verbal. There were times when he appeared to be very non-verbal and not to understand very much. So, this was attributed to retardation.

The adjustment reaction, well, there were times when he was able to behave pretty well, he would get paroled to the rape conviction, the records reflect that he did well then, so, perhaps it was adjustment reaction. So, again, people saw slices of behavior and based on what they saw, they might make a diagnosis, and others say the psychiatrist, indicate that there are some observations that he heard voices, and they were auditory, and I believe, visual hallucinations Well, there was one doctor that had, I think it was Dr. Pebbles, I have to check my notes, who conjectured that he may well have picked this up at Austin, at the state hospital, and so, there was some question about malingering in terms of [1729] psychosis, in other words.

BY MR. SMITH:

Renew, for the record, Estelle v. Smith objection and move to strike the testimony from the record.

BY THE COURT:

Objection is overruled.

BY MR. SMITH:

And, a Motion for Mistrial.

BY THE COURT:

Motion for Mistrial is denied.

Q Go ahead, Doctor.

A It was Dr. Pebbles, who stated, and this was on the 19th of May, 1979, he, in reference to Mr. Penry, relates that he has on occasion, heard voices and saw things, but, he is very vague, and I, Dr. Pebbles, talking people, that he probably learned this at Rusk State Hospital and is using this as an excuse to cover up his offenses.

Q I think that maybe at the date that you said, May of 1979, I believe it should be May of '77, Doctor.

A I may have typed the wrong date in my notes here, I don't know.

[1730] Q When he was examined by the Polk County MHMR?

A Yes, it is in the Polk County Folder.

Q Okay. Was that on the first rape case with Diana Koch examination?

A Yes.

Q Okay. What again did Dr. Pebbles say there that he may have learned that?

A At Rusk State Hospital, as an excuse to cover up his offenses.

Q Did you see instances where he would use maybe mental retardation as an excuse?

A Yes. There was several observations made by his using, or at least a conjecture that he was using the mental retardation and again, the TDC Medical Records, Volume One.

BY MR. SMITH:

Same objection, same motion, Your Honor.

BY THE COURT:

Objection is overruled.

A This was, if my memory serves me correctly, it had to do with a breaking of a sink in his cell, and Mr. Penry felt he should not have to pay because he is retarded, and in a discussion at that time, he brought up, this is a quote, "If [1731] I was working, they may think I am not retarded, anymore." In other words, he thought that the fact that he was working in a work capable program, might suggest that perhaps he wasn't retarded.

Q And, just generally speaking, were there examples of where he would use his mental retardation as an excuse?

A Yes.

Q Okay. Was he, or has he been diagnosed as having anti-social personality on several occasions?

A Yes.

Q Do you concur with that diagnosis, Doctor?

A Yes.

Q Would you kind of tell the jury about what an anti-social personality is?

A Well, the term anti-social personality cannot be applied to an individual unless he is eighteen or over, but, the onset occurs before the age of fifteen, and there is a list, I have the DSM3.

Q You don't have to go through it, unless you want to.

A Alright. Let me just say this. In my review of the records, there was a series of expanding and intensifying anti-social acts, virtually in [1732] every category; sexual misconduct, fire, fight, theft, runaways, and this again, very, very clearly in life, I think there was something in the records about a three-year old brother, but in any event, everyone has problems with this human, whether at home, or the attempt at school in these institutions in which he was in, because he would not live within the norms and standards or guidelines of those institutions, except again, like I said earlier, when it served his purpose, and as it obviously did in terms of earning a parole.

Q Did you note from his records a broad range of criminal behavior as you just mentioned?

A Yes. In virtually every area, sex, property, assaultive, references to substance abuse, although, there was

not a major pattern, but, it was there, and a lot of violence.

Q What significants do you attach to the fact of that broad range of criminal activity?

A Well, that this – that Mr. Penry was a person who really, simply made a series of choices over time not to live within the, as I said earlier, the norm and standards of society, that he had a mind of his own, that he wanted to establish [1733] himself in this world, in his way, to exert power over people, or control people that he could control, that he was able to shut off concerns of right and wrong, long enough to do what he wanted to do, and did so with very, very little remorse, if at all, and that is a person who, in a sense, was the law within himself.

Q Is that consistent with anti-social personality?

A Yes.

Q Okay. Is that type of conduct or behavior necessarily consistent with mental retardation?

A Is it consistent with mental retardation?

Q Right.

A I would say, if anything, it is probably pretty inconsistent.

Q Inconsistent, but, it would be consistent with an anti-social personality?

A Yes.

Q In reviewing those records and his prior criminal and violent behavior, did you note where that may have

involved any premeditation or planning, outside of the incidents that you have already mentioned about the murder at hand as well as to the rape of Diana Koch?

[1734] A Well, I think some of the things that I referred to earlier, the fact, that is, Mr. Penry was able to kind of capitalize on the appearance of being retarded, or he would threaten, there was a threat to act crazy. This was a person who did what he wanted to when he wanted to do it.

Q And, did you see specifically in his records where he had threatened to act crazy or act mentally retarded?

A Yes. This is from the TDC Medical Records.

BY MR. SMITH:

Can we have a continuing objection to everything out of the TDC records, Your Honor?

BY THE COURT:

Alright. The objection is overruled. You can answer the question.

A On Page 296, there is a quote by the staff, "He stated that he might start acting crazy if he didn't get a cell change."

Q Okay. Based on your review of those records, in your opinion, can he exercise self-control when he wants to?

A He can and he did.

Q What about acting deliberately?

[1735] A He did, and he can.

Q In your opinion, Doctor, based on those records and what you have seen of this man, would you describe him as an aggressive or a passive individual?

A Aggressive.

Q Would you describe him as violent?

A Very.

Q Is he capable of acting voluntarily?

A Yes, he is.

Q These choices to engage in criminal activity, the criminal activities that you have seen, is that based upon his free will or is he just impulsive and can't control himself?

A Well, really, no indication that he is not able to control himself, that is, this is inside, he was able to control himself and there were periods where he was relatively well-behaved.

Q Based on the records that you reviewed, would you say that he is a manipulative individual?

A Yes.

Q Have you seen any indication that he showed any remorse?

A No.

Q Is he a loud criminal?

[1736] A Yes.

Q Does he have a criminal personality, as you described previously, in your writings?

A In the extreme sense.

Q Is he dangerous in your opinion?

A Yes.

Q Is he likely to change?

A Well, you know, I think that is – it is a fair question, and I have asked questions about a person changing, and the answer is this. Who knows. That would be – have to use past records as the best indicator, and also, one other thing, you did ask me whether he had expressed remorse and I said know, and there was also, nothing that I read in this whole pile here, nothing that I recall, anyway, saying that he really felt that this way of life was no good and for any of us to change anything about ourself, I don't know if the way it looks with cigarette smoking, much less a whole way of life, you have to reach a rock bottom and you have to be fed up with yourself, not the situation and I would say the prognosis would be pretty bleak.

Q Has his criminal behavior declined or escalated [1737] as he has gotten older over the years?

A It has expanded and intensified.

Q Has it become more violent?

A Yes.

Q And, has it continued to be violent and assaultive even with him confined in a maximum security?

A Very much so, even in prison.

Q Okay.

BY MR. PRICE:

I pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. SMITH:

Q Who is Gregory Mark Campbell, Doctor?

A I beg your pardon?

Q Who is Gregory Mark Campbell?

A I don't know.

Q Was he a patient of yours?

A Gregory Mark?

Q Campbell. Is he a patient of yours?

A I cannot reveal who my patients are.

Q Was he a drug dealer?

A I cannot make any comment.

Q Well, it is a matter of public record that you submitted a report for him, isn't it?

A I don't know if that is a matter of public record.

[1738] BY MR. SMITH:

I ask the reporter to mark this as a Defendant's Exhibit, a document.

REPORTER'S NOTE: (WHEREUPON DEFENDANT'S EXHIBIT NUMBER TWENTY-NINE WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. SMITH:

May I approach the witness?

BY THE COURT:

Yes, Sir.

Q I show you Exhibit Twenty-Nine, Doctor. Does this refresh your memory that it is a matter of public record that you submitted a report to the United States District Court on the matter of Gregory Mark Campbell?

A That is so shown in here.

Q And, it is a matter of public record that Mr. Campbell made the mistake of arranging a sale of fifty thousand dollars worth of cocaine to an under-cover agent.

A I don't recall the amount.

Q But, he did get into legal trouble for doing that, didn't he?

A He did.

[1739] Q If you look at the document, does it reflect your memory on the amount?

A I see the amount that he sold.

Q What is the amount that he sold?

A Five hundred grams.

Q That is what he pleaded to. What is the amount he really sold? Keep reading.

A Yes, here is a price. The price is $20,000.00 per kilogram of cocaine was negotiated.

Q Twenty thousand per kilo. How many kilos – no, not the plea, how many did he really sell?

A They are negotiating the sale of two –

BY MR. PRICE:

I am going to object unless Counsel has got some place he is going here with the relevance to this case.

BY MR. SMITH:

Relevant to credibility, Your Honor.

BY MR. PRICE:

What credibility? That he had a patient?

Q Did you submit a report to the District Court saying Mr. Campbell is a good kid?

A I didn't.

[1740] BY MR. PRICE:

Object to relevance. I still don't understand the relevance.

BY THE COURT:

Ya'll approach the bench, just a moment.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY THE COURT:

Where are you going?

BY MR. SMITH:

Perfectly obvious, he is not upset with criminals when they are paying his fee.

BY MR. PRICE:

I didn't say he was upset with criminals anyway.

BY MR. SMITH:

Something that I intend to ask him about Mr. Penry, who he couldn't profile so well, Mr. Penry has paid his fee.

BY MR. PRICE:

We would ask for voir dire outside [1741] the presence to enable us to find out where he is going with this thing.

BY MR. WEEKS:

We are talking about a drug case and we don't know anything about drugs.

BY MR. SMITH:

I don't intend to go into any more of the details.

BY THE COURT:

I will overrule your objection.

BY MR. PRICE:

Just let him go.

(END OF CONVERSATION HELD AT THE BENCH.)

Q You say you didn't use the expression, "Good Kid," in the substance of your report?

A I don't have the report here, I don't think that is applicable for me to discuss the personality of a person that I have evaluated, but, if you have the report there.

Q I don't, Doctor. I would show it to you if I did. Did you get a fee from Mr. Campbell for doing the report?

A I get a fee for all of the professional work I do.

Q Including the work that you are doing today, [1742] correct?

A Correct.

Q Mr. Campbell get off with fourteen months in jail?

A When you say did he get off with I don't know how many months he actually served.

Q Look at Page 7 of the document in front of you. Does that refresh your memory that he was sentenced to fourteen months in jail?

A That is what it says. I was not asked, I was not at the hearing.

Q I take it, Mr. Campbell didn't fit your model as a criminal personality?

A Well, criminal personality is a matter of degree and so, certainly there were certain thinking patterns that underlie selling illegal drugs, but, it is a matter of degree.

Q And, with him, it wasn't just a great degree that he should get more than fourteen months in jail, correct?

A That was a matter of the court deciding.

Q You helped the court make that decision, didn't you?

A What I did, was to describe as I do in submitting a report for anybody that I evaluate, I reported [1743] my findings to that individual, which I am not at liberty to discuss here.

Q But, the federal guidelines would have given Mr. Campbell six and a half years as a minimum, correct?

A I don't know what the guidelines are. Here it was pointed out to me, I don't know what they are.

Q Try Page 4.

A Alright. Yes.

Q And, can you tell us without being unethical whether you didn't say in substance to the judge that Mr. Campbell deserves a light punishment?

A I did not take a position as to whether he deserved a light punishment or what punishment should be. This man did commit a serious offense, and his life, as I recall, was not one of expanding and intensifying criminal activity over a period of many years.

Q And, did he pay your fee?

A He or his family, I don't recall.

Q If Johnny Penry or his family paid your fee, would that change your view of his conduct at all?

A Not at all.

Q What is your fee being paid by the State today?

[1743] A I am being paid $2,500.00.

Q Is that a flat rate or an hourly rate?

A That is flat rate.

Q And, how many hours you put in?

A Well, this is the fee for being here today, and then, for reviewing the documents it is $150.00 per hour.

Q Twenty-five hundred just for showing up?

A For being out of the office and being here, yes, that's correct.

Q And, then, a hundred dollars an hour – how much an hour?

A A $150.00 an hour.

Q A $150.00 an hour for how many hours?

A Approximately twenty.

Q Fifty-five hundred for the whole performance?

A Somewhere around that.

Q Who is the Trail-side Killer?

A Trail-side Killer is David Carpenter.

Q And, you testified in the Carpenter Case?

A I haven't thought about it, but obviously.

Q You testified – I am going to call him the Trail-side Killer so we don't get confused, okay?

A Alright.

[1745] Q You testified against the Trail-side Killer, right?

A I testified in a penalty phase, yes.

Q But, you were called by the State?

A That's correct.

Q And, paid by the State?

A Correct.

Q And, what did Mr. Carpenter do to get the name of the Trail-side Killer?

A He killed a number of women in various parks on trails in California.

Q What is the number of women he killed?

A I don't remember.

Q More than seven?

A I think there was somewhere around that. He may have been suspected of killing even more.

Q Was he an intelligent young man?

A He was intelligent.

Q Was he ever physically abused by his parents, asfaras you know, physically abused?

A There was a controversy about that.

Q Did he suffer abuse, Doctor? I think there was a claim of emotional abuse, not physical abuse.

A Primarily emotional.

Q Who is Dr. Jeff McDonald?

[1746] A He was the marine who killed the members of his family in North Carolina.

Q His wife and two little girls, right?

A Correct.

Q You testified against him in a civil case, correct?

A That's correct.

Q And, he was a successful young doctor, correct?

A That's correct.

Q And, a talented young man?

A Right.

Q Seemed perfectly normal until that happened?

A No, that was from all appearance.

Q No history of child abuse asfaras you know?

A You mean his being abused?

Q Yes.

A Not that I recall.

Q Essentially, the story there was that he was a normal doctor who came home one night and decided to kill his wife and two little girls, right?

A Well, it wasn't quite so simple. In fact, what I was asked to testify to was also the use of material to talk about the kind of personality that there was. A person just doesn't go kill somebody out of the blue.

Q You were hired by his adversary in that particular [1747] case, right?

A Yes. The suit was against the person who wrote the book.

Q And, your pay was from John McGinnis, who wrote that book, right?

A That's correct.

Q Now, I guess, what I am asking you, Doctor, whether you believe that there are any significant – you believe that the Trail-side Killer and Dr. Jeffrey McDonald are different in any significant way from Johnny Penry?

A Well, the key word is significant. In many ways I don't think there is any difference at all. In some ways, there are differences.

Q There is a difference in IQ isn't there?

A Yes.

Q Indeed, have you – you testified that there has been a clammer for better conduct of telling IQ, and that clammer is going on, isn't it?

A Sure.

Q They haven't found one yet, have they?

A No, they haven't.

Q You are not expressing the opinion as to what Johnny Penry's IQ is, are you?

[1748] A No.

Q You made a reference on direct examination to my notes. Do you have those notes there?

A I'm sorry, reference to what?

Q You said that there was a typo in your notes, the year, 1979. Could I see your notes?

A Sure.

BY MR. SMITH:

May I approach, Your Honor?

BY THE COURT:

Yes.

A Here, let me put them in order and you can see them all. (Witness handing).

Q Did you actually type or dictate these yourself?

A I typed those myself.

Q Okay. You don't mind if we borrow them for a few minutes?

A Be my guest.

Q Thank you. Was there any police report among the documents that you reviewed, Doctor?

A I believe so.

Q Did you ever do a final report of these other than these notes?

A No.

Q You talked about that eighteen year study on [1749] direct examination. Do you remember that?

A Seventeen year study, yes.

Q And, it was a study of two hundred and fifty-five people?

A Yes.

Q And, everyone of them was significantly different from Johnny Penry, weren't they?

A Certainly everybody is a different individual.

Q You know what I am getting at don't you?

A No, I'm not sure.

Q Isn't it true that everyone of those two hundred and fifty-five people were of average intelligence determined by prior testing?

A No, we had several people in that study, at least two or three who tested in the high fifties, low sixties, but they were all of normal intelligence.

Q You added, that last line when you saw me taking out your book, didn't you?

A Certainly, because we had people – we had two or three people that tested in the sixties, but, as it turned out, they were perfectly able to converse, and that test was by no means an indicator of their intelligence.

Q Let me ask it again. True of false, some were average intelligence as determined by prior [1750] testing?

A As I recall, there were two or three people where there were variations in their testing, and they were as low, I don't remember whether they were in the sixties or we had anybody below that.

Q Did you ever take a true or false test, Doctor?

A I hate them.

Q Well, I am going to subject you to one right now. Try it again. Are subjects of average intelligence as determined by prior testing, true or false?

A Yes, because – you got to let me make this point, and that is that we had two or three people in that study who were tested and they were tested – some of them were tested more than once, some of these results were like Penry's and a number of them had variations in their source, so, I am going to be perfectly honest, which I certainly want to be, their scores would vary, and certainly everyone that we had at some point had, if you just use the score, had an average intelligence but, not to every single test.

Q This is your book, right, The Criminal Personality?

A Sure is.

[1751] Q Just for my benefit, read the sentence I under lined out loud on Page 4.

A Well, you did a good job of doing it. I will be glad to read it.

Q See if you can.

A "Our subjects were of average intelligence as determined by prior intelligence" and I stick with that.

Q And, is Johnny Penry of average intelligence as determined by prior testing?

A No.

Q So, most of your subjects had no genuine learning disability, right?

A I think that would be a fair statement.

Q And, you recognize that learning disability can be a seriously handicapping condition, correct?

A Sure.

Q And, being mentally retarded is worse than a learning disability, right?

A Yes.

Q You testified on direct examination about the term anti-social personality disorder, right?

A Yes.

Q Is the term psycho-path generally a synonym for [1752] anti-social personality?

A The name doesn't label it, psycho-path, and socio-path and anti-social personality.

Q Different labels for the same thing, right?

A Pretty much.

Q And, you recognize those as being scientifically valid labels?

A Oh, I have my quarrel with them.

Q When you testifying then on anti-social personality, you didn't tell the jury about the quarrel that you had with that term, did you?

A I think the question –

Q The question is whether you told the jury about the quarrel that you had with the term anti-social personality disorder?

A No.

Q You have written, haven't you, although, diagnoses may make a distinction between the psycho-path and criminal, essential purpose, one is hardly different at all from the other, that is your opinion, isn't it?

A Yes.

Q And, you have written, have you not, "I have many quarrels with psychiatric labels, but never in a report to a court, school or other agency, [1753] have I written that a young child has an anti-social personality." Did you write that?

A That is absolutely correct.

Q Have you broken your string now?

A Not at all. I asked what diagnostic category would be closest. I can't make up my own, so, if one is going to take a diagnostic category out of the DSM3, that is certainly the closest.

Q But, you didn't tell the jury that you were just picking the closest and in fact, you thought, that was a category that concealed more than it reveals, right?

A I think all of the categories have those problems.

Q The problem that they concealed more than it reveals?

A I would say yes, to just simply stick a label on a person without really explaining how that mind works and that person feels themselves in the world, yes, I think there are problems with that.

Q Did you discuss that label on Johnny Penry without going into your speech about how bad labels are, didn't you?

A I tried to be responsive to the question.

[1754] Q If you had been asked if the label was meaningful you would have told him no, is that correct?

A Asfaras any label from the DSM3, that would certainly be the closest. I do not tend, myself to believe that labels are particularly useful.

Q What is a psycho-path, the psychiatric classification?

A The psycho-path was a term that was pretty much called that and I would think, again, the same point about labels.

Q And, you have also made the point, haven't you in all fairness, I think you said it on direct examination, too, attempt to project who will commit crimes in the future are notoriously very difficult, right?

A It is difficult.

Q Those two hundred fifty-five men in your study, is it fair to say, that most of them had caring parents to do the best to help with their children?

A That was not initially what I told you, but as we went on in our study with them, we found that that was

basically the case. Again, a matter of degree, some more some less.

Q You have written that on child abuse, haven't you?

[1755] A Some.

Q You're not a specialist, but, mention it in the course of your writing, some?

A It is mentioned.

Q And, your generalized feeling that the child abuse is a child's fault, right?

A I never, ever said that.

Q Okay. Have you said, or did you write the following, "One boy was punished as a child by being locked in a bathroom, tied up in the basement and beaten with a strap. He was the only one of six children who had been raised by his parents to the point that they metted out cruel punishment, not to condemn the parents' method in dealing with him. The point is that children like him, by unrelenting provocation, may have a violent reaction to the parents' placid disposition." Is that what you wrote?

A Absolutely.

Q Do you think Johnny Penry is an example of that?

A I think he may well be. Again, without condoning, and I think that is important, I didn't say in that book, that tying a kid [1756] to a bed and beating him was justifiable or condoned. I talked about the nature of the youngster and what he illicits from his environment.

Q And, you say, Johnny Penry may well be an example, he may well be an example of what the child illicits, right?

A In part.

Q Did you have an opinion of whether he is or not?

A I think to some extent it was from what I read his mother had problems of her own, and again, it has nothing to do with justifying what was done to him, but, if a youngster is difficult and hard to contain, and bites his three year old brother and destroys things and breaks out windows, I think even the most patient and reasonable parents would be tried pretty hard, even less, a parent that might have problems of her own.

Q Doctor, we have heard testimony in this case that Johnny Penry's mother began to beat him violently starting with a nine month old baby in a high chair. Assume that testimony to be true. In your opinion, did he provoke that?

[1757] A I would have no evidence that at nine months he did. I don't know what he was like at nine months, I don't know.

Q Well, the testimony is that his mother hit him hard with her fist because she didn't like the way he was eating. Is that the sort of provocation that you wrote about in your book?

A No, it isn't, what I wrote about in the book.

Q Got some testimony that when he was two years old, he was on purposed scolded in the sink. Do you think that he provoked that?

A I have no information about provoking that.

Q You wouldn't want to venture an opinion as to whether he provoked that or not?

A I would rather stick to the facts that I have. I don't know. I would doubt it, but, I don't know. I don't know what went on.

Q And, you are not saying a psycho-path had it coming are you?

A No, I am not saying that.

Q There is testimony that when he was quite a young child, his mother held him under water in the bathtub, screaming, I am going to drown you, you little bastard. Would that testimony mean that he provoked that?

[1758] A I don't know what led her to doing it, and certainly, again, the same answer, I do not have facts about what he was doing, or the truth of those allegations. I can't comment.

Q Well, you are commenting pretty good when Mr. Price was questioning you. You know the truth of all of those allegations that you commented on?

A You are asking me, if I understand your question, what did Johnny Penry provoke when he was two years old, or whatever, a young age or whatever.

Q Exactly.

A And, I do not know that he provoked those behaviors.

Q You have an opinion as to whether he did or not? Let's go back to the nine month old in the high chair. Give me an opinion how he provoked his mother that time?

A I don't know. Let me say this. If he did provoke her in any of these cases, certainly, her response was criminal in and of itself, and excessive.

Q You would say the same if she went after him with a butcher knife, threatening to cut off his penis?

A Yes.

[1759] Q Even if he provoked her by wetting the bed?

A Certainly.

Q Now, I am going to ask you a hypothetical question, Doctor. You know about hypothetical questions?

A Yes, Sir.

Q I want to make some assumptions. I want you to assume that he was hit by his mother's fist in a high chair, just like I told you. I want you to assume that she scolded him in the sink when he was two, that the scars are visible to this day.

I want you to assume that throughout this childhood, she beat him violently with leather belts, switches, taken from a tree, extension cords, clawed her with her hands, kicked him with her feet, she burned him with the butt of a cigarette, she left him for a long period of time in a darkened room without access to a toilet, broke his toys over his head, forced him to kneel against a heater until

his legs were blistered, she forced him to eat – , and drink urine, she called him little bastard, not affectionately, but cruelly, she went after him with a butcher knife and threatened to cut off his penis, just like I said, and when he was [1760] a two year old, the neighbors could hear him screaming during the day in pain and terror.

If that is true, that is one of the more appalling childhood stories that you have heard, isn't it?

A Yes, it is.

Q And, if you make all of those assumptions, Sir, do you have any opinion as to whether child abuse attributed in any way to Johnny Penry's bad conduct later on?

A I don't think that the cause and effect connection is established. There are certainly kids who go through some terrible, terrible things and they don't go out and rape and murder.

Q That is quite true, Doctor, but that wasn't my question. My question was, do you have an opinion as to whether child abuse attributed in any way to the bad conduct? Do you?

A I really don't know, but, I don't think it explains the path he took in life.

Q I did not ask you whether it explained it. I will ask you the same question one more time.

Do you have an opinion as to whether or not –

BY MR. PRICE:

[1760] Objection, Your Honor, asked and answered. He answered it both times.

BY THE COURT:

Go ahead and restate your question one more time.

Q Do you have an opinion whether the child abuse contributed in any way to Johnny Penry's later conduct?

A When you say later conduct, I don't know what you mean. I don't think so.

Q Your opinion is, that he would have committed those crimes if he had had a perfectly normal loving mother, just like you and me, that's your opinion?

A I think there is a fair possibility of it. There are people who come from loving homes that do some terrible, terrible things.

Q There are indeed, and you testified against a couple of them, right?

A I have testified in cases of people from all kinds of families and backgrounds.

Q But, this is not one where the Defendant came from a really loving home, and did terrible things?

A No, I never contended it was.

Q And, you would admit, Sir, that physically hitting [1762] your child can be a way of teaching him that violence is acceptable?

A A child might conclude that. But, I don't know that it is a way of teaching him that.

Q Have you written, "Whacking Their Offspring Has Virtually No Long Time Effect Except to Convey the Message of Violence Is Acceptable?"

A It can convey that message. You asked me or I thought you asked me is it intended to teach such a message. It may or it may not. Depends on the child. As you see from reading that, I am certainly not an advocate of indiscriminate beatings.

Q I am glad to hear it, Doctor.

A Well, I am glad that we have it straightened out.

Q You have also written that child abuse does not invariably produce criminals, right?

A Yes.

Q But, it does very often produce criminals, doesn't it?

A I don't know that.

Q Yet, you did find it necessary to say invariably, when you wrote that sentence, child abuse does not invariably produce?

A It is a cause/effect connection, that's correct.

[1763] Q Would you agree with me, Doctor, that the worse child abuse – let me back up. Any child, any child in the world can grow to be a law abiding adult. Is that your opinion, right?

A Children make choices, yes.

Q Would you agree with me that the worse abuse the harder it is for a child to make that choice?

A No.

Q What was your impression of Johnny Penry's mother, when you read the file?

A That she had serious problems of her own, and that as you pointed out to me, again and again, that she was certainly far from the ideal mother in the way that she reacted to her child, although, I believe that was still puzzling to me, and it is puzzling, I don't know the answer why it is, but, in that family, there were three other kids, who were not treated the same way.

Q Do you know whether she had hated those kids, the way that she hated this one?

A I suspect that she didn't, but, then again, they were all different in the way that they acted and the problems they presented.

Q They didn't provoke her the way Johnny did?

[1764] A Well, there was nothing that I read that indicated that they did.

Q Well, there is nothing that you read that indicated that he did?

A Certainly.

Q Well, when he was nine months old?

A No.

Q When he was two years old?

A As a child, the biting of his brother and the destroying property, the breaking out of windows, the wandering out of the house, I am simply saying that he was a difficult child.

Q You know how many of those allegations came from his mother?

A I think some of them did. I also believe that if my memory serves me correctly, that his aunt also documented that he was a very, very difficult child, as did some of the other documents that I read. I think I read something somewhere about his poking kids with pencils in the first grade, and his punching kids with scissors. I mean, he was trouble everywhere he went.

Q Where did you get that bit about the aunt? One of the prosecutors give you during the lunch break?

[1765] A I believe in the Harris County – in the evaluation in the Rusk State Hospital, or the Austin State Hospital Folder, I believe there is an evaluation, and I think – and I can –

Q My question is, did one of the prosecutors call your attention to that during the lunch break?

A Yes.

Q And, you say that information came from the aunt, but, do you know if the aunt ever observed the poking with the scissors?

A I really don't know.

Q Do you know who told the aunt that he did that?

A I do not know the source.

Q You read Shirley Penry's psychiatric history?

A I don't have the separate evaluation of her. I know that there was a post-partum psychosis, I know that she had many, many problems of her own.

BY MR. SMITH:

I am going to ask that the witness be shown Exhibit Sixty and Seventeen, Sixteen and Seventeen.

Q Now, Doctor, these documents are not in evidence and I don't want you to read from them, but, can you tell me if you have seen them before?

[1766] BY MR. PRICE:

Your Honor, may we approach the bench?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH.)

BY MR. PRICE:

He is again trying to impeach the witness improperly or whatever he is trying to do improperly and he is trying to get these records before the jury, which there has already been an objection and a Motion in Lemine which he just violated. I made verbal Motions in Lemine, the day the records were presented, that they not be offered or in any way put in front of the jury.

BY MR. SMITH:

I have not offered them. I am allowed to ask the witness what he has reviewed.

BY THE COURT:

I am going to recess any way, and let him look at those records. We may need to take up something before we bring [1767] the jury back in.

(END OF CONVERSATION HELD AT THE BENCH.)

BY THE COURT:

Ladies and gentlemen of the jury, at this time we will recess for about fifteen minutes. We will start back at about twenty-five after. Doctor, go ahead and look at those.

BY DR. SAMENOW:

Alright.

REPORTER'S NOTE: (WHEREUPON A RECESS WAS HELD AT 2:15 P.M.)

BY THE COURT:

Mr. Smith, approach the bench just a minute. You might want to help him find what you are talking about, and we might need to take it up before we get the jury back in. Anyway, I want to hear the questions in regards –

BY MR. SMITH:

The question I am referring him to at this particular page and ask if it effects his opinion.

BY MR. PRICE:

If what?

[1768] BY MR. SMITH:

Ask if it effects his opinion.

BY MR. PRICE:

About what? About the mother?

BY MR. SMITH:

Whether the child provoked the abuse.

BY MR. PRICE:

Your Honor, I would request this line of questioning outside the presence of the jury.

BY THE COURT:

You get over what I was suggesting, save some time. You show him.

BY MR. WEEKS:

I point out to the Court that we had a Motion in Lemine on that, and you ruled on it, and Mr. Smith, directly, intentionally violated that Motion in Lemine.

BY THE COURT:

He hasn't put the contents in.

BY MR. WEEKS:

He brought it to their attention. The Motion in Lemine went to even mentioning it in front of the jury.

[1769] BY MR. SMITH:

I don't think so. I haven't even told the jury what those exhibits are.

BY MR. WEEKS:

Sure did. Exactly, told him medical records of the mother, that is, fifteen and sixteen, not in evidence, and called them that.

BY THE COURT:

Right now you show him what you are looking for and we will start back in five minutes and we will take it up out of their presence.

REPORTER'S NOTE: (WHEREUPON THE COURT HELD A FIVE MINUTE RECESS.)

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION AND PROCEEDINGS WERE HELD OUTSIDE THE PRESENCE OF THE JURY.)

(JURY OUT)

BY THE COURT:

Mr. Smith, you can ask those questions.

QUESTIONS BY MR. SMITH:

Q Have you finished reading the material, Doctor?

[1770] A Yes.

Q Does it effect your opinion in any way as to whether Johnny Penry provoked his mother's abuse?

A No.

BY MR. SMITH:

Let me ask that in the presence of the jury, Your Honor?

BY THE COURT:

I don't know if you asked him that. Is that what you are going to ask?

BY MR. PRICE:

Is that all you are going to ask him about those records?

BY MR. SMITH:

Yes, Sir.

BY THE COURT:

That's all you are going to ask about those records?

BY MR. SMITH:

Yes, Sir.

BY THE COURT:

Alright. Bring the jury in.

(JURY IN)

BY THE COURT:

Okay. Mr. Smith, you can proceed [1771] with your cross examination.

Q Okay. You read what I showed you during the break, Doctor?

A Yes, I did.

Q And, they don't in any way effect your opinion about whether Johnny Penry provoked his mother to abuse him?

A No.

Q You say that you saw a couple of times this business about his biting his three year old brother. Do you happen to remember what document that is in?

A No.

Q Is it in a diagnostic evaluation dated July 29, 1965, dictated by Dr. Noel Cowan?

A Yes.

Q Read the full sentence to us, Doctor, that you were referring to.

A I will have to find it.

Q Try the second page, about the middle. You looking for the document?

A Yeah.

Q I will show it to you. (Handing.) Read the full sentence that I have underlined there, please?

A "Mrs. Penry stated that Johnny was changeable in [1772] his moods, often loving and kind, to his siblings, but, more than likely aggressive toward me and especially the three year old boy who he bites."

Q Who stated that?

A His mother.

Q Now, you asked me about the siblings and you, asked if there is any explanation, you asked if there is any explanation of where siblings turned out differently. Did anyone mention to you before you took the stand here that Johnny Penry was believed to be an illegitimate child, and only a half brother to his siblings?

A I believe that there was something in the record, but I don't recall where that is his mother had had an affair with a "mexican" and that he was an offspring of that. I don't know if that is a fact, but, I did read that.

Q Is it possible that could account for her hatred and abuse of this child?

A Well, there would be other explanations as well.

Q That could be one of them, right?

A Possible.

Q But, if the other siblings got on the stand and testified in substance, under oath, that she abused all of them, but, she abused Johnny a lot [1773] worse, would you doubt that testimony?

A If he himself said that?

Q The siblings.

A The siblings said it? I would have no particular reason to.

Q And, of course, you know that siblings – none of the siblings were mentally retarded, don't you?

A Asfaras I know, they were not.

Q It is your view, isn't it, Doctor, that child abuse is not any excuse for criminal conduct?

A That's correct.

Q Is there a difference in your mind between excuse and mitigation?

A Well, by mitigation, – there is a difference between excuse and mitigation, certainly, a person can use something as an excuse after the fact, or if there could be something in mitigation, but, I think the question still is whether or not, at least in my view, when you say mitigation, does the fact that he did experience this treatment in the hands of his mother, that mitigates the terrible crime that is committed. To me, that still implies the

cause/effect action, that because of something [1774] that happened when he was younger, that, that could somehow mitigate this terrible crime that he committed.

Q You say no?

A No.

Q And, it is still your opinion that it is a pure coincidence that he had this childhood violence, disruptive violence?

A Well, I don't think I can use the pure coincidence. As I said earlier, I don't think really that anyone has been able to establish with scientific or medical certainty why a person lives the kind of life that Mr. Penry did, why a person has a series of expanding and intensifying criminal patterns, so, I couldn't answer the question about why.

Q Well, you can't answer with scientific certainty, but, occasionally we use common sense, don't we?

A I sure hope so.

Q In common sense, Doctor, isn't it likely that child abuse had something to do with violence when you grow up?

A When you say something to do with, I don't know what you mean. I mean, that could include anything.

[1775] Q Which word are you having trouble with?

A The something to do with. I don't think that the fact that a person was abused has really – it is not a

necessary or sufficient condition to explain why a person has done all of these things that this man has done.

Q So, it is still your opinion, that if you had a kind, loving mother, never laid a violent hand on him, he would have done just the same crime?

A I think it is entirely possible.

Q But, is it your opinion?

A Yes.

Q And, your opinion is that no child abuse, no matter how severe, can ever mitigate the guilt of an criminal, even a little bit?

A I don't think it is a mitigating factor because people do and endure terrible, terrible things that don't go out and rape and murder.

Q When they go out and rape and murder, they make choices in your view, right?

A Yes.

Q And, you would agree with me that Mr. Penry is mentally retarded?

A I don't think that he is mentally retarded.

Q You can assume that he is, you don't know that [1776] he isn't, do you?

A I have my doubts, but, I don't know.

Q Assume that he is.

A That I would agree with.

Q You have your doubts that he was abused, too, don't you?

A I do not. I did not say that.

Q Well, tell me now.

A No, I said I think, too, maybe three times, that if indeed the reports are accurate, that he did endure some pretty terrible treatment. I don't think I questioned whether or not his mother did terrible things. I don't know if she did all the things she is said to have done, but if she did any of them, sure is pretty terrible.

Q Would you agree with me that the things that she did, were not entirely his fault?

A Yes.

BY MR. SMITH:

Pass the witness.

BY THE COURT:

Any other questions, Mr. Price?

BY MR. PRICE:

Just a couple.

[1777] REDIRECT EXAMINATION

QUESTIONS BY MR. PRICE:

Q You just said that what the mother did would not have been necessarily his fault, if she did in fact abuse him, is that correct?

A Yes. I cannot sit in this Courtroom and say that every single thing that she did was his fault.

Q Right. Likewise, Doctor, what he did later in life, such as rape, murder, arson, those kinds of things, when he was a teenager, when he was a grown man, you think were the fault of his mother?

A Well, I don't think his mother should be on trial here. The answer is no.

Q Did, based on the records that you have reviewed, concerning the rape of Diane Koch, did you have an opinion as to whether or not the Defendant, chose to rape her?

A I have no doubt about the matter that he did.

Q Okay. Did he choose to rape and murder Pamela Carpenter?

A He did, and he thought about going after her for several weeks.

BY MR. PRICE:

[1778] No further questions.

BY MR. SMITH:

Nothing further, Your Honor.

BY THE COURT:

You can step-down. Thank you.

BY MR. PRICE:

The State rests, Your Honor.

BY THE COURT:

Would you all approach the bench?

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

We would make our objection to those documents.

BY THE COURT:

We will do that after I let the jury go. I want to let them go. We are going to get the Charge today and I am going to schedule the Dickerson Hearing. I was notified this morning that he was available today or tomorrow. I just soon do it tomorrow after we go to the jury, but, that is up to you all. If you want, might could get him here in a hour or an hour

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[51:1828] JURY BY THE JUDGE, THE ORIGINAL OF WHICH IS IN THE DISTRICT CLERK'S TRANSCRIPT IN THIS CASE, AND NOT INCLUDED HEREIN.)

BY THE COURT:

Again, you are not to consider the arguments of the attorneys that you are about to hear as evidence. You have already heard all of the evidence, it is their summation to you and their evidence to see the evidence in the light most favorable to their side of the case.

If the State is ready, you can proceed with your opening argument.

BY MR. WEEKS:

May it please the Court, Your Honor, Ladies and gentlemen of the jury, on behalf of the people in the State of Texas, I thank you for your service, and I would thank you for your first verdict, but, I think the evidence was overwhelming and clear what that verdict should be.

And, we now we come to the crucks of this case, and what this is all about. Punishment. And, I want to talk to you about [1829] some of the issues, and review the evidence with you, and what you must consider in making the decision that you are called upon to do.

You have taken your oath, and now, you have a duty to base your verdict on the evidence and the law. The Charge is fairly short. Three questions.

"Was the conduct of Johnny Paul Penry that caused the death of the deceased done deliberately and with a reasonable expectation that Pam Carpenter or another would die."

The second questions, "Is there a probability that Johnny Paul Penry would commit acts of criminal violence that would constitute a continuing threat to society?"

And, finally, the last question, the provocation question, "Was the conduct of the Defendant, Johnny Paul Penry, in killing Pamela Carpenter, the deceased, unreasonable in response to provocation if any, by the deceased?"

And, that is the last time I am going to refer to that question, because I think the evidence here is so overwhelming and [1830] so clear that there is no way any reasonable juror could find that it wasn't unreasonable. What provocation? That's all it was.

And, after you consider those three questions, then, you got to come to the issue of mitigation. Longest instruction in here is on mitigation. I want to draw your attention again as we start, and later in my argument, to the important – of that. You are instructed that your answers to the Special Issues, which determine the punishment to be assessed the Defendant by the Court, should be reflective of your findings as to the personal

culpability of the Defendant, Johnny Paul Penry, in this case.

Personal culpability. Responsibility, blame. It goes on to talk about the mitigating facts. Something that is going to lessen, reduce that responsibility of Johnny Paul Penry in this case.

Lets talk a little bit about the evidence in the case. The State opened in Punishment you are to consider all of the evidence that you heard at the first phase of this trial, everything, facts of the crime committed, [1831] the act of the Defendant, all of it. What did we start out the case and punishment with? We brought you people that had been with him in the last ten years, people that had dealt with him in prison, that knew Johnny Paul Penry.

Gregory Dennis. What did he tell you about it? Johnny Paul Penry with a club, broom handle, broken off, threatening other inmates. Got him in his cell and he had a shank, a homemade weapon, had prepared it, brought it out from under his bunk. The officer told him to give it to him, so, he broke it up. You are not going to write me up for this are you, Boss? Yeah, I am going to write you up. He was able to talk to him. He was able to converse with him, able to understand him.

Then, we brought Lt. Grant. Lt. Grant, who had been there with him from 1986 to 1989. He knew Johnny Paul Penry. Can he read and write? Yes. Can he understand you? Yes. Can you understand him? Yes. This is a man who worked with [1832] inmates with convictions and the most maximum security area of our prison system, and what did he tell you about Johnny Penry? He doesn't follow the rules, he is assaultive he is dangerious, and in

this man's opinion, he has been around him for the last three years, he is dangerous to do it again.

Then, we brought you Captain Selman. Captain Selman been around there with him maybe since '87, I believe it was, Selman was CO. Again, had to take a broken board away from him, take another weapon away from him, take another weapon from him while he is locked in the most maximum security area of our prison system, and he had got weapons. What else did he tell you about him? He understood me, he could read and write, I could understand him, he could understand me. You know what really hit me about that? Was when he talked about the privilege. Johnny Penry, could bargain with Captain Selman, bargain his good behavior for privileges, bargain his good behavior to get back off restrictions. Negotiating. Dealing. Is this poor Johnny, [1833] mentally retarded man? Does it sound like it? Captain Selman, who has been around him, dealt with him day after day, said he couldn't have him in a rec group, because he was always causing trouble. He was assaultive he was dangerous. This is a man who has dealt with him day after day after day, and he knows him. Knows him well.

Then, we brought you Frank Bragg, deputy over in Polk County, kept him back in 1980 in a courtroom, and Johnny Paul Penry got up and grabbed a big, glass ashtray and he threw it at Joe Price, and he went over the table after Joe, and it took four men to restrain him, and this is a man that has been a deputy fifteen years and he has never, ever, ever, seen a defendant do that. What does that tell you about Johnny Penry?

Captain Keith. Captain Keith, who had been down there from 1982, to 1989. Captain of it. Dealt with Johnny Penry for seven years, knew him, talked to him, dealt with him, knew the kind of person that he was dealing with. Now, what did he tell [1834] you about him? He is dangerous, he is assaultive and he will do it again. A man that knows convicts, has worked around prison systems and knows what he is doing. Very interesting, too, did you ever hear one of them say anything about him being mentally retarded? Not one word.

Then, we brought you Jackie Howdeshell, She told you how that Johnny Penry followed her and came over and asked her to marry him, and dropped little hints about rape that is going on, break-ins, break-ins, rapes. Scared her. Scared her. She didn't know what she was dealing with, and she come home and finds out that somebody has been in her house, and she didn't know who.

And, then, Captain Cook took the stand, again, and he found out who had been in her house. He found out who had been scheming and plotting and thinking about coming into her home. He went there to see Jackie, and he thought she might be hiding in the house, and he knew that she had a nine year old child, and he cut the screen and went into her home. For what reason? For what reason? [1835] Read State's Exhibit Forty-Eight (C). "If it had not been the chick I stabbed and killed, it would have been Jackie or some other chick, but, I don't think it would have been Jackie because she wouldn't have fought me."

Think of the testimony of Dr. Quijano about rapist and how they think. How they look at it. – rapist. The – rapist thinks the use of power, intimidation and pain, dominating another. What does he think it is going to get him? He thinks after he is through, they are going to love him and that is what Johnny Penry thinks.

And, then, the State brought you Diana Koch. The victim that survived her meeting with Johnny Penry, and what Johnny Penry did to her was written on her face, carried in the tone of her voice, and it rang true on her story. You know, you think about what she testified to. Remember that ID? Remember when she identified him from the stand, and she looked around the courtroom, there he is. Never forget him. He is heavier now, that's him, Never forget him, [1836] because I never let my hair – cut my hair off, never let it grow long again, because of what he did.

And, what else did she tell you about him? She pulls up in her car and Johnny Penry, comes get in the car with her. "My brother, my brother has been in an accident, he is badly hurt, I just need to go down the road. Can you take me? I need to go right away, he is in a red mustang." He convinced this woman, that mentally retarded individual convinced this woman against her better judgment, as she told you to trust him to take him down there to that road, to go to where his brother was hurt. Good story. And, a good act. And, they are going down the road, made some comment about his hair being short, and he said he just got out of the air force, Thinking on his feet. Keep feeding her that line. Keep feeding her that line. Fed her that line. Finally, she is worried, gets too far to call on the CB. She picks it up and the cord has been

cut. Microphone cord has been cut, and Johnny Penry has [1837] got a knife in her side, with his hand on her hair, and he took her out looking for a place, looking for a place alone, and away from other people, and he got upset and her. She placated him, played along, and I think it is pretty clear what would have happened to Diana had she fought him like Pam Carpenter, but, she played along. Took a lot of guts. A lot of courage, thinking.

And, then, he drives though this – finds this place and drives the car through the gate and gets down in the woods and remember what she said he said? What he told her? He looks around, "You can yell, no, you can scream, nobody will hear you." And, then, he laughed, and then he laughed, and he had his way with her, and he used that knife, and he never put that knife down because she likes knives.

And, then, after she has gone along with him, he has decided she loves him, they are going to get married. Think about Dr. Quijano's testimony about the statistic rapist. He is – , he is donominating, he [1838] is inflicting his pain, and now, he is sure that he is falling for him.

And, he gets the car stuck, they get back out, she is wearing that poncho, cape thing, he has got that knife. Two hunters come by and pick them up. Johnny wants to keep her close, he keeps them in the back of the truck. Go down to Signo, that little store, and this tells you an awful lot about Johnny Penry. Think about her testimony. She jumps out and she starts telling these people, I have been raped, I have been raped, he raped me, he raped me, and what does Johnny Penry do? Does he stand there and

say no? No, he immediately starts saying no, that is my wife, she is throwing a temper tantrum, that is the way she is, that is the way she throws a temper tantrum, that is what she does. Quick, fast thinking on his feet. Making up a story. Could you have thought of that in that situation? Could you have thought that quickly?

And, then, when that didn't work, when they didn't fall for that one, "Well, [1839] I have got this friend, and I will call him and he will be here in just a few minutes, a thousand dollars just to forget what happened." A bribe. Thinking. Thinking. Always thinking of a way to beat the wrap, and, think about that. That told you an awful lot about this Johnny Penry, this "mentally retarded individual."

And, then, we get the confession, in from Captain Maurice Cook, and Johnny tells him about the rape and then, finally, who do we hear from? We heard from Warden Sanders Estes, who has been in East Texas, who has been in corrections for over fifteen years, dealt with thousands upon thousands of convicts, spent much of his time at Ellis One Unit, a maximum security, and dealt with Johnny Penry in the most maximum secure area of our penitentiary, and what did he tell you about him? He was down there with a board broken off, threatening people, Sanders Estes went down there and had them roll the doors and he went in there and took it away from him. What happened when he took it away? What did Penry do? Went [1840] for his right pocket, and "I grabbed his arm and I twisted it behind his back and I reached in his pocket." And, what did he have? A shank. Razor blades melted into a toothbrush handle. Great weapon. Flashing weapon. Cutting weapon, sharp edges.

Johnny Penry. And, he knows Johnny Penry, he has been with him, been with him from sometime in 1980, right after the killing of Pamela Carpenter to 1985. knows him. What did he tell you about him? He can read and write, he can understand me, he can follow the rules, if he wants to. When he wants to. No problem understanding him, no problem he understands me. You know, the only one of those doctors that said anything about having any trouble with Johnny understanding him or Johnny reading and writing, was Lt. Grant. When did it happen? About 1989, when he got all of this publicity about being mentally retarded, suddenly he had trouble understanding, he had trouble reading and writing. Manipulator. Manipulative.

[1841] And, that was the State's case in chief. What we got? We got Dr. Fason's testimony, from the first part of trial. Yes, he could act deliberately, he acted deliberately in this case. You look at what he did, how he carried out the attack on Pam Carpenter. He thought about it. He thought about it for three weeks, and he decided that he would go over there. And, what did he do? Did he go wandering up to the house? No, he circled the block, scoping it out, and checking it out, see what is about, seeing what he had to worry about, planning, scheming. Two cars parked. When he went to the door, and knocked on the door what did he do? "Is your husband home?" Pamela Carpenter made a mistake, she said no, and then, what did he say? "What are you doing here? I came to fix the stove." Planning, scheming, working for a way to get into that home, working for a way to get what he wanted. The criminal mind, the criminal personality. There it is.

And, he got in that home, then, in [1842] his own words, he tell you, "I knew that if I went over and raped her I would have to kill her because she would squeal on me and tell the police, and I didn't want to go back to the pin." Thinking, plotting, knowing what he was doing.

And, after he raped her? "I decided to stabbed her with the scissors she stabbed me with." He went over and picked them up and he took them back and he drove them in to her. How much more deliberate and ugly and cold and vicious can you get? Its not possible. Its not possible. Deliberate.

Future dangerousness. Everyone of these officers have dealt with him tells you about him being a future danger. His actions tell you. His stalking of Jackie Howdeshell, his attack on Diana Koch, and that act that he did to Pam Carpenter. That tells you what he is, what he is capable of, and oh, so clearly what he would do again if he got the chance, because the testimony of those officers tell you pretty clearly, nothing has changed from Johnny Penry. You put him in the penitentiary, he [1843] is still dangerous, he is still getting weapons, he is still stalking, because that is the way he is.

Like I said, Question Number Three, three questions, three answers, and they are all yes.

So, what do we have in response to that? Lets look at the Defense case here. Lets look at these mitigating factors, these mitigating circumstances that should convince you to lessen his personal responsibility for this crime.

We heard from the family, we got the pictures of the scars to the leg. I was looking through this earlier. We had

all of this testimony about the scars and the beatings. The only scar on Johnny Penry's back in 1979, was the wound that Pam Carpenter put there when she tried to fight him off, close up, but, we got the scars.

Then, we had Belinda Anderson, the sister who hadn't testified before, and it comes down to some horrible, horrible things that she told about. Even if half of them is true, it is a bad, bad state of affairs, [1844] but, lets look at some of the things she did say. Little Bastard. Mama called him a little bastard. Again, again, we heard that. The room smells. The room smelled horrible. Room smelled bad. Played cards with Johnny. He is retarded. And, it is funny, I think that every time they ask the family, every time, is Johnny mentally retarded, yes, Johnny is mentally retarded, he can't read and write. He has corrected that.

Also, she told you about the horrible things of abuse, beatings, she told you a story about making him drink his own urine. Trudy went and got the glass. Trudy is it. I was real young. And, then, on cross examination, when she was asked about Johnny's behavior, about his violent behavior, her answer was, I was too young, I don't remember, I don't know. I was too young, I don't remember, I don't know. Remember the abuse, but, she doesn't remember his violent behavior. She hasn't visited him in the last ten years. I don't think she has seen him since he was what, fifteen or [1845] sixteen years old, I believe. Hadn't been around him.

Then, we heard from Trudy Penry. She also testified before, the room smelled, she called him a little bastard, marks on the back, marks on the back, scars, beatings,

and yes, she told about his drinking urine, but, it was a totally different story than the one that Belinda Anderson told. She didn't seem to remember the one that Belinda told. Said Johnny was never intentionally mean to his brother. Her previous testimony, that she had made under oath in 1980, she couldn't remember talking about Johnny's violent behavior, wasn't sure of everything, I think it was, she kept saying. She didn't remember his violenct act toward his brother. That, she testified to. She couldn't remember his behavior problems in school, and at home, that it caused them all trouble. She doesn't remember Johnny Penry peeling the skin off his little brother's feet, Jesse Penry, the brother. Johnny wasn't mean, and violent. He only hurt me a couple of times, and he always apologized. Oh, yes, he did [1846] peel off the skin from my feet, but, you know, what we found out was the next witness, a couple of witnesses after, didn't tell you about his brother trying to – him, when he came back from Mexia State School, did he?

And, one other thing, that really hit me with Jesse, was, we didn't hear anything about how bad that room smelled.

Lucille Anderson and Jesse and Trudy all, said that he was retarded that he couldn't read and write.

Lucille Anderson. A lot of her testimony was, particularly on cross, was I don't remember, somebody told me about it, somebody told me about it, I don't remember the arson, I don't remember going to Harris County and making this report, when he was under charges for arson, to try to help him. Don't remember that. That was thirty

years ago. Did she testify anything about the smell in the room? No.

Patsy Fuller. He is retarded, he can't read or write, mother worked nights, and Belinda Anderson said she couldn't remember [1847] her mother working at night. The aunt said yes, the mother worked at night, Daddy worked during the day, and she also said something I thought was interesting. She said, Johnny's mother wasn't always hateful to him, she was nice to him sometimes. She also said, yes, Jesse told us about Johnny trying to – him, have anal intercourse with him. She also talked about him, yes, we told them there about Johnny had problems with wandering out at night, that is why we locked him up at night, breaking out the windows, going out and wandering out in the neighborhood. Just trying to protect him, taking stuff out of his room so he wouldn't hurt himself. They were worried about that. And, yeah, we told them about aggressive, hostile, and hot he cut and polked others at school with scissors. Boy, does that ring out in this case. And, that didn't come from Mama, that come from two aunts that testified to you, and his sister that testified to you, had told about Johnny Penry's violent behavior, told about it in 1973, told about him cutting and stabbing [1848] other kids with scissors, told about him being hostile and aggressive. Didn't come from Mama. And, the room smells bad.

Marilyn Barnet, sister. He was normal and then, he became mentally retarded. Little bastard. I think you probably notice sometimes in there she talked about things that people told her. Hearsay. We didn't object because you all need to hear it all and weigh it all. You need to have everything you can in a thing like this. We

let it go. No smell. She lived with them, she had been in that house, came over all the time, didn't smell that room.

Then, we heard from Mrs. Johnson, the neighbor who had her moment of glory on the stand, who listened to weeks and weeks of screams, came down to one or two, three, sat there and listened and I kept trying to get Mrs. Alnee to come over, and she came over and drank coffee and ate cinnamon rolls and listened to it start. Went over there. Where is Mrs. Alnee? Both sides have subpoena power. Mrs. Alnee, she can tell you she supposedly called Child Protective Service. [1849] She went into the house with her. Where is she? She didn't see anything, she just heard things.

Carolyn Ward. She was there. Made Johnny sit in one place, locked him up, twelve and fourteen hours. I never did figure out exactly how she knew it went on for this longer period of time. We asked her about the room that Johnny stayed in. It was cluttered. Anything else unusual about it? No. No smell.

You can understand the family, you can understand the Penrys, what they want to do, since none of them, has been to see him, since none of them have been to see him in prison, visit him, spend time with him. They came up here, Trudy Ross and the aunt that testified at the previous trial, along with Johnny's mother and now they are back again. Memory improved in some regards, memory not so improved in others.

And, then, we heard from Jay Randall Price.

BY THE COURT:

[1850] You have used about thirty-five minutes.

BY MR. WEEKS:

Thank you, Your Honor. Jay Randall Price, what did he tell you? He told you a lot of things. Talked about this Halstead Test, he only gave nine out of the ten, didn't give the MMPI, no relation.

He did say this, though, no relation between mental retardation, brain impairment, and the rape/murder of Pamela Carpenter. Mental retardation, brain impairment. Doesn't mean he can't blame Johnny Penry for capital murder, and then, we went through these records that he only had selected portions of. We found out about the fire, the arson, the fighting, the setting fire to a patient at Rusk State Hospital. Johnny Penry did it. Aggressive, hostile, fighting, arson. Johnny Penry, upper mild on the retardation test. He also told you that he spent eleven hours, he could communicate, talk back and forth, I could understand him, he could understand me, you know, they spent eleven hours together.

[1851] And, you know, that is the one thing that really struck me about his testimony. He is the only witness that they put on this stand that has spent any time with Johnny Penry since back when he was what fifteen, sixteen years old? The only one. The only one that has spent any time with him in the 1980's and he spent eleven hours, and his semi-blind analysis, yes, it would be very helpful to know about anti-social behavior, but, I don't think that it is important. I think the medical tests were important, but, they didn't show anything, so, they don't mean anything.

And, this damage is to the entire cortex of the brain, and remember what Dr. Quijano said when he was asked,

well, what would you have if you had a brain damage to the entire cortex? Oh, yes, that is possible. You would have a vegetable.

He couldn't find anything, he couldn't find anything physical, so, he made reality fit his tests. Instead of seeing how his [1852] tests messed with reality, instead of seeing how this man can function. I don't think he ever said that he was an expert in mental retardation. He talked about that DSM3 alot. He didn't mention the second part to identifying somebody that is mentally retarded, and that is their adaptive skills, looking at their adaptive skills.

And, then, they read some things to you into the record. They read you some letters, and one of them, kind of hit me. They read it to you, I believe Mrs. Lieb read this to you. "Dear Mrs. Penry; Thank you for your letter of recent date in regard to Johnny." And, then, it went on about the desire to take Johnny home. In here, in these Mexia State records is a letter from Johnny Penry's mother. Now, we heard a lot about her, the horrible person that she was, and yes, she had problems. You know, she did bad things to Johnny, but, listen to this letter.

"Dear Mrs. Parker: We were up there last Sunday, and as you probably already know. [1853] Sorry we didn't get to see you as I had wanted to talk to you concerning Johnny, but maybe we will see you next time. Mrs. Parker I told Johnny that we would be up there in two weeks, and, if we could, we would bring him home for a little while. He wanted to come home so bad, which I know is only natural. I would like your say so in this matter. We would love to bring him home for a couple of weeks, but

we don't want to do anything if you think it might hinder him in any way. We want to do what is best for him. Please write and let me know what you think in this matter. Johnny had very good remarks on the school and seems to like everyone there. I can see that Johnny has improved a great deal, and it made us very happy to see this. You have a wonderful school there and we always want to do what you think is best for Johnny's welfare. If there is ever anything at all we can do to make it better for Johnny, please don't fail to tell us. Please answer and let me know what you think about Johnny coming home."

[1854] There is another letter in here from the mother, I won't read it to you, but, there are two sides to that story, and what did we put in rebuttal? We have heard all of this testimony about child abuse, and we have heard Dr. Price on mental retardation. Dr. Quijano, came in here an expert in mental retardation, a man who set up the mental retarded program in TDC, which it is clear, that Johnny is not a part of. He talked to you about mental retardation and what you have to have. State laws, and this diagnostic and statistical manual that every one of these people have cited, too both said before you can make a diagnosis of mental retardation, you got to have two things. You got to have an IQ score which measure academic ability, a sub-average score there, which apparently Johnny has. Pretty clear.

And, you have got to look at adaptive skills, survival skills. How does he get along in the world? How is he able to deal with people? How is he able to read [1855] people? What have we got here? Reality. Take the test, and then, see what the reality is and put them together to

see if you got retardation. And, he put them together with Johnny Penry and what did he tell you? He is not mentally retarded.

And, I think when you go back through there and you think about that testimony and you think about what he did with Diana, and Pam, that is not the act of a mentally retarded person. That is the act of someone who can think and reason and act on and he did, for his own purposes. He follows the rules when he wants to.

Talk about that brain impairment. He said that you have got to look at the function in real life to make that test mean anything. As a check on that test, the MMPI is very important. That is the best test, seeing if somebody is motivated, faking, if they are malingering, and it wasn't given.

And, then, we come to the testimony about child abuse. Child abuse. There is no connection between child abuse and criminal acts. No connection. And, he speaks from [1856] good experience. Remember what he said? I came from an abused background. My father was an alcoholic, he abused me. He also said that his father loved him. He loved him and abused him. Counsel asked him, well, you have heard all of this stuff about Johnny Penry. Don't you think he had a worse time of it than you did? And, what did Dr. Quijano tell you? It is too close to call.

We make choices in life, we make decisions in life, and we go one way or the other. Dr. Quijano made his decision, Johnny Penry made his. Criminal mines.

Then, he talks about the anti-social personality and the rapist, the power rapist, the angry rapist, the sadistic rapist.

The sadistic rapist. Dangerous. he will do it again and again. Anti-social personality, and then, he said it was more likely than not, Johnny Penry will commit acts of violence in the future. What did he say that he had to look at? Had to look at whether he was anti-social, and along with that, he is making that work with the fact that he is a rapist, he has [1857] anti-social personality disorder, he is a rapist. You got to look at the act of the Defendant before the crime, the planning, the pre-meditation, the forethought, the working it out, and we got that in both cases, folks. It is there.

Then, you look at his acts after. Did he attempt to help her? Did he show remorse? Uh-huh. "The chick I stabbed." The chick I stabbed. The chick I stabbed." Again and again. He really cared, didn't he?

This cover-up. Changing his clothes. Just so happened, that Officer Nelson snapped to that description and got Johnny Penry, otherwise, it would be a pretty good deal. Otherwise, that cover-up may well have worked.

And, then, you look at the condition of the person that has been changed, and he has changed, has he? Has he? The only person that you heard that has been with him for the last ten years made it very clear that he hasn't changed. He is no different. He is the same. He is still [1858] manipulative, the same. And, then, the crime. Deliberateness of it. We got that. He is street wise. Street smart.

Dr. Samenow, closed, and he said, that you got to look at the adaptive skills, Tests don't mean anything if you don't put them into reality. If you don't put them in reality, it is nothing but numbers. Adaptive skills. And, in this case, it was used for evil. Remember telling about some of the things that he read in the report, how this abused, how he used mental retardation as an excuse when he broke a sink in TDC? "I shouldn't have to pay for this, I am mentally retarded." Excuses, excused. Again and again we hear it, but the crime resides in the minds of the criminal.

You know, we have heard for years, society's fault, it is our fault, mother's fault, father's fault, somebody else's fault, I had a bad childhood, I had a bad this, I had a bad that. When does that come back to individual responsibility? When does it come back to the fact that [1859] we are responsible for what we do? It is time that Johnny Penry took responsibility for his acts and he has shown that he understands and he reasons and he deals with things.

And, Dr. Samenow and Dr. Quijano, there is no connection. Mental retardation, actually more likely to be non-violent than violent. No connection with child abuse and violence. And, I think it is interesting that we had all of this testimony about child abuse but we didn't have a single person, not a single expert, a single person in that field, a single person that deals with child abuse, a single one of them except for the expert people that we brought to you, to come up here and tell you anything different, because that is the way it is, folks. There is no connection. Simple.

And, something else I noticed with Dr. Samenow. It is sort of an old term of art in our business, if you can't go after an expert any other way, go after his fee. Lets face it, folks. J. Randall [1860] Price was paid, Dr. Quijano was paid, Dr. Samenow was paid. So what? If you don't have any other way to go after him go after them that way.

Five books. He got asked about three sentences out of five books. No child abuse expert, nobody that has been with him the last years. It is not there.

You know, on voir dire, Mr. Wright, talked to you about you got to have an idea of the whole person, you got to have all of the evidence, you got to consider all of the evidence, you got to know what you are dealing with, and what did they bring you? Selected experts, bits and pieces. An expert who hadn't looked at everything, and they want you to make a decision. That's why we let you hear it all, the good, the bad and the ugly.

You got an important decision to make, but, look at the evidence. Look at Johnny Penry. Look at him. And, you know something else? All of these reports that they read to you about his mental retardation and the reports and stuff? You know that [1861] hit me again and again and again throughout all of these reports? Is the people always talked about his ability to improve his behavior. They talked about his ability to improve with help to function better with help, to read and write better with help, that he could improve himself. Nobody wrote him off, none of those people ever did. Yes, he had a bad education and a bad childhood, but, what does that come down to in the end? That he was abused as a child? You can have sympathy and you can have compassion for the

child was Johnny Penry, just as we have sympathy and compassion for the child that was Dr. Quijano, but, does that mitigate his punishment? Does that change it? No, because you are instructed that sympathy you got to based it on the evidence, it has got to be tied to this case, and it has got to be tied to his personal culpability.

And, did you ever, ever, ever, ever, in your entire thing, hear one thing that connected any of his background to the [1862] crime that he committed? No. Not one bit. It was designed to tug at your heart-strings.

You know, when you think about victims, I think about Diana Koch. I think about Pamela Carpenter. I think about the victims that almost were, Jackie Howdeshell. I think about the victims to come, that are coming that he has shown they are coming.

You got an awesome responsibility and awesome duty, and a duty it is, and what is duty? Duty is to do what is required, what is necessary. To follow your oath, the evidence and the law. Just as Diana Rearden came to you and did her duty, and opened up that cold, ugly part of her life for you, relived it after fourteen years, she did her duty.

Pamela Carpenter, stabbed and died and bleeding, did her duty. She made certain that her killer will be caught, so, he won't hurt another.

And, now it is your duty to make a decision in this case, and based upon [1863] the evidence in this case, the answer to each of those questions is yes. Yes, it was deliberate. Yes, he is a danger. And, yes, there was no

provocation, and there is no mitigating evidence to mitigate his personal culpability, to mitigate against his responsibility. Child abuse, mental retardation, mental impairment, didn't do this to Pamela Carpenter. Johnny Penry did. Go back and make your decision. It is in your hands. Think about it, think about the evidence, think about him, and when you do it, and I think you will find from the evidence that there is only one choice left, and that is to answer each of those questions yes and let him take the responsibility for what he is, what he has done and the choices that he has made. Thank you.

BY MR. SMITH:

Can we have a short break?

BY THE COURT:

We can break now or break in part of your argument?

BY MR. SMITH:

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[51:1865] BY MR. SMITH:

Yes, Your Honor.

BY THE COURT:

You can proceed.

BY MR. SMITH:

Ladies and gentlemen. You probably know Judy Lieb and I have been guest in your community for a couple of weeks, a little more now. We were a little like anyone coming to a new place, I guess, we were a little apprehensive when we first came about how we would be received. I think maybe my friend, Joe Price, is a little hopeful that our reception wouldn't be too good, because I know it was me that he was pointing at in the guilt/innocence summation and took his yellow pad and said, "We will not be intimidated." So, I tried not to be too intimidating today. I admit that I raised my voice to a few witnesses yesterday, but, I think but for that, I haven't been too bad, and we certainly, my colleagues have been absolutely delighted to be in this community with the reception that we have got. Never [1866] seen so many nice people collected in one place. I guess that's because I come from a town where not everyone is nice, everyone is nice all the time, and we particularly met nice people in this Courtroom. I want to thank Judge Dean for his many courteous' to us and I especially want to thank Joe Price,

even if he did point at me. He and his colleagues have been very gracious to us everyone on our side and we have got the best kind of treatment that we would have asked for. I need, obviously, to thank the jury. Thank you. I think what I thank you for especially is the real dignity and seriousness and your attention that you have brought here. Very, very serious case. I know it is going to be.

You heard, you remember the arguments on the Guilt/Innocence Phase, in the case. That is the last time that we really got to talk to you. We have been talking in front of you since then, the last time, anyway, I talked to you, and obviously, we accept your verdict on the guilt/innocence, [1867] on the guilt of this Defendant. The evidence is there. You are not going to hear us re-arguing. We think that this stage of the trial, is very, very different. One of the differences is that you will not hear us talk as much as you heard Mr. Wright talk about proof, this burden of proof at this stage of the case. I will remind you, and I don't mind telling you, the burden of proof is exactly the same thing as it was, the State still has to prove beyond a reasonable doubt everything that it has to prove, but, I am not going to talk so much about that here, because to me, the burden of proof isn't going to turn this case. You are not going to decide this case on burden of proof, not going to decide the punishment on burden of proof, you are going to decide on what the evidence shows.

And, what I am going to say to you, ladies and gentlemen, is that the evidence shows that this is not the kind of man you kill. I say that knowing you found him guilty of an absolutely horrible crime, [1868] and the strange proof was produced, which I am not going to

argue, a horrible and frightening rapist. What I am giving you is a choice on this stage of the trial, is between the Death Penalty and Life Imprisonment. I am going to keep reminding you of that all the time I am talking. It is very, very important to understanding what I am saying to you, that no one is saying that you don't have the power not to punish him. No one is saying don't punish him. No one is saying forget about it. No one is saying, don't punish him very severely. Your choice is between the extreme penalty, the death penalty, the ultimate penalty in the law, and the other choice is life in prison. That is the choice that you are making.

I do want to try and help you put it a little bit in perspective. See what the death penalty is, and of course, I am not going to stand here and make a speech against the death penalty. There are cases in which it is the jury's duty to impose the death penalty. I am [1869] here to tell you that this is not one of them. The way I want to give you an idea of what it means is this. Take me. Forget about Johnny Penry a minute. It is me. I am not mentally retarded, and I have – I had a very good childhood, I got no mitigating factors for what I am doing. Suppose I pick up a knife or any kind of a weapon and I walk over to Judy Lieb, cold blood, for the worse motive, and in plain site of all of you, I cut her throat and kill her? It might surprise you to know that, ladies and gentlemen, that for the crime that I just described, you could not give me death. That crime is considered too mild a crime in the eyes of the law to deserve the death penalty, because it is only a murder. It is not a capital murder. You have a capital murder here it is a murder combined with a rape, and that does make an awful crime, but, I am saying to

you that the death penalty is not something that you can throw around. The death penalty is reserved for the very worse, not just the [1870] very worse crime, but, the very worse criminals, and what I am saying to you, is that for this man, this case, life imprisonment, is enough.

Let me just give you a preview of what I am going to say to you, what I am not going to say to you. First, I am going to talk to you about what the law calls mitigating circumstances, and things that don't excuse a crime, they make the criminal's guilt a little less bad, and I know I sound like a broken record, but, that is all I am saying here, is about the mental retardation and the child abuse. They don't make the crime not bad, they don't make him not guilty, they don't entitle him to forgiveness, they don't entitle him to be free from punishment. All they do is making it a little less bad, that is the difference between life imprisonment and the death sentence.

When I talk about the mitigating evidence, I am going to talk specifically about the special issues that are before [1871] you and first I am going to talk about the deliberateness and I am going to argue to you that the State has not proved deliberateness here beyond a reasonable doubt. The evidence just isn't there, and that I want you to understand now, that is a different argument, a completely different point from the mitigating evidence that I talked about.

What I am saying here is they haven't proved the deliberate crime, they haven't proved a deliberate crime, a crime committed cooly, thoughtfully, not in hast. They haven't proved that kind of a crime and you must answer that Special Issue, that first Special Issue, no.

What evidence is mitigating evidence you would have to answer it no, even if he didn't have anything about the mitigating evidence.

I am going to argue on Special Issue Number Two that the right finding is Johnny Paul Penry, in prison will not be a dangerous man, not the kind of a danger that you should answer yes, to Question [1872] Number Two. He is not.

Obviously, I am not going to argue Question Number Three. I am not going to say Pam probably provoked him where the death was unreasonable. I am going to come back at the end and talk a little about my client.

Okay. Mitigating evidence. The last time I am going to haul out my hand-written sheet here. Johnny Paul Penry is mentally retarded, and the State is trying to prove that he is not. Really, just trying to prove something that you can't prove, because he is a retarded man. I am going to get to it, I can hear, he is not saying it, I think Joe Price is saying behind me, so, I am going to get to that question, but, first, lets get it straight. Lets get the facts straight. They have been testing him since he was a seven year old boy, and he has never showed up anything but mentally retarded. How many kids seven to nine years old, don't do the best they can when they are tested? How many kids who aren't retarded, get [1873] sent to the Mexia State School for the retarded? He is retarded and the fact that he can talk to you, you can talk to him, which many witnesses have said, doesn't prove that he is not retarded, and there is no credible proof, that he is anything but retarded. They say that he wasn't trying on those tests. That is not the evidence. They go back to

when he was seven years old, all over the record, one of the many pathetic things in this case is all the documents say Johnny tries very hard. He can't do it, but, he tries very hard.

How did he get to be retarded? We don't exactly know. His Aunt Marilyn has an opinion how he got retarded. She thinks his mother made him retarded by hitting him on the head with a shoe when he was four years old, and then, I suppose it really doesn't sound very likely because the mother hit the four year old boy in the head with a shoe to cause the kind of brain injury that makes a kid retarded. Even if she lost her temper and hit him hard, it wouldn't [1874] do it. It is too strong. If a woman gathered all of her strength and went like this, maybe that could cause it.

We don't know why he is retarded. We do know that there is something wrong with his brain in the way that his brain works. Randy Price, I thought, was an honest, convincing witness. He told you in great detail, exactly why he says that there is something wrong with the brain. An old injury, not something that you can spot on the medical tests, but the brain doesn't work right. I am not going to go through the details, it is there. There is something wrong, with this person's brain, and of course, we are going to – there is evidence, there is evidence indeed, I think Mr. Price will tell you that when you say a child is retarded, you should say, mildly retarded. So, lets say that he is mildly retarded. Mildly retarded. I think some of the evidence says, mildly retarded, in the sixties. Some of the older scores are way down below the sixties, even below fifty-five, maybe the threshold. That is the so-called [1875] moderately retarded rank, but, I think the

evidence suggests that those scores were low. Why do you think they were low in Johnny's childhood? Why do you think he is even less capable, even less able to function? But, lets say, mildly retarded. What does it mean to be mildly retarded? Mildly retarded is a misleading pair of words. There is nothing mild about the problem.

You know from Mrs. George, the lady from Mexia, who Judy questioned late last week, that the most the mildly retarded person can look forward to is a life of very simple, manual labor, or under very strict supervision, and got to be a frustrating, confusing life being mentally retarded.

Mildly mentally retarded, maybe I suggest that Dr. Quijano, maybe it is even worse being mildly mentally retarded because you just might not go, that you are way down there in the bottom one percent looking up to the rest of the world and it is frustrating.

[1876] And, I guess I will say to you that it is one thing that you have to consider. Frustrating to be mentally retarded because it is more frustrating as you get older, because the body grows up and your mind doesn't, and you got a person with a mind of a child, the body of a young man, and here, tragically, we had the person with a mind of a child, and I don't know why the Lord does it this way, but, in the mind of a child, the strong body of a young man, the sex drive a young man, what a combination. And, I am not saying, I am not saying, I told you that I would repeat it, but, I am not saying that excuses what he did. I am not even saying it explains what he did. If fact, I am not even saying that it is the

biggest mitigating factor in this case, because it is not. The child abuse is. It is one reason, let me explain the difference, it is one reason why I think you can say Johnny Penry, listen to what happened here, but, I can hear Joe Price, I am going to have to alter the argument, I am going to be stepping [1877] out of character and pretending to be Joe Price, because he is entitled to speak after me, and he can answer what I say, and after he sets down, I am not allowed to get up, I can't answer a word that he says, so, I have to try to expect what he is going to say, and sometimes maybe I will be right, and sometimes I will be wrong, and if he says something I didn't expect and that I haven't answerered, that I am going to leave it up to somebody in the jury room, to make the answer for me, but, one thing is quite clear, like you to say, plenty of mentally retarded people that don't go around acting like this. Great majority of the mentally retarded people never get near any crime like this, and he is perfectly right. I am not saying don't punish him, but,nevertheless, he is right.

The most – my picture of the most mentally retarded people probably is a fair picture. Most of them are sweet natured, very harmless people, they need a lot of help, but, they are not hard to take care of. I must say in the record [1878] that you will see flashes of time, you will see that Johnny Paul Penry was that way some of the time, but, God knows, no one is ever going to forget what he was.

Why is it that most mentally retarded people are able to act somewhat nice? Well, mentally retarded children are called special children, and his parents and their parents know this, both parents know that they are special and give them special love, special help, and usually

it falls to the mother to do that, more to the mother's special care of that special, healthy, vulnerable little child. And, when you – when they get that special care, they are going to be okay. They can live harmless maybe sometimes happy lives. Even though, they certainly have to live with a lot of frustration and unhappiness, they can be okay.

Johnny Penry had a different kind of mom. See these? Pictures, Penry Family Album, not real pictures, but, starts with a child of nine or ten months old, very few days, happened to be a favorite, children [1879] some of them walk, some of them can't because they are small, and pick them up and put them in the high chair, and they say often times they can begin to feed themselves, but, of course, often they haven't mastered it, and they smear it all over their face, trying to get the spoon in their mouth. This is Shirley Penry, his mother, she goes like that. Johnny is not Marilyn, she told you that, and when Mr. Weeks summarized the testimony on child abuse he tried to find something to say about everything, but I think that is one he skipped. You think they were making it up?

Next change in life, two year old baby. Alright. Maybe it is two year old is not a baby, maybe two years is not very big. Motheris bathing him in the sink, but,she got one reason or another she scolded him with the hot water and he is scarred. You saw in the photographs that was admitted into evidence the scars. The scars are there to this day on the back of his legs.

[1880] Now, talking about these scoldings in hot water, we have all probably had the experience of taking

– or getting the shower a little too hot, and put your hands in the sink when it is too hot, or pull your hand out or you jump right out of the shower. Just think for a minute about someone much, much bigger than you are, holding you in there. That is the kind of mother Johnny Penry had.

Of course, she told at least a couple of people, Johnny did it to himself. She left him in the sink he turned on the hot water himself. Remember the baby sitter, Carolyn Ward, who testified? She was maybe a fourteen year old baby-sitter, when these things happened, she didn't see it happen, she saw the injuries and she thought it was kind of funny that the injuries were on his back. How do you turn on the hot water behind you? She admitted, mother admitted, her own sister if I remember it right, Aunt Marilyn, she admitted that she did it. [1881] Said, oh, oh silly me, and according to Trudy, just a little girl herself at the time, she remembers it, she thinks the mother did it, she didn't make that up. Anybody, anybody, in the world that we have got, who thinks that she scolded him on purpose in the sink. Mr. Weeks showed you that picture of Johnny's back when Johnny was arrested and showed the scars weren't there, and I suppose what he is trying to say to you, that the scars that you saw in the picture are more recent, but, if you compare the two pictures, the scars are further down on his leg. The picture when he was arrested, didn't go down that far, but, the scars were there.

I am reading from State's Exhibit Ninety-Nine (A), Page 16 of State's Exhibit Ninety-Nine (A), and it is a little write up that the Mexia State School did when

Johnny Penry first came there in 1969, when he was twelve years old.

"Soon after mother's return to the home, subject received severe burns on the lower part of his body." That is, "returned to [1882] home to mother, the mother reported that the child, she was bathing him at the kitchen sink, she left him alone for a short period and he turned on the hot water. He now has severe scars on his legs."

Those scars were there when he was twelve years old, but, let me read another sentence to this, read it again. "The mother reported that while she was bathing him in the kitchen sink, she left him alone for a short period and he turned on the hot water." The mother's report. That is what the mother reports. They didn't believe it. No one believed it. She did it on purpose.

Well, then, he gets to be four years old, and this is when Aunt Marilyn thinks he was hit with the shoe, and she thinks it left him retarded for life, and we have other, other horrible events we can't put dates on. The child was made to stand against the radiator until his legs blistered. That was what Trudy told you.

We have Aunt Jane, coming to visit, try [1883] to do something, interrupted by screams, and running to the screams to see Shirley going like this with an extension cord on her little boy's head, but that is just the time she saw it. We know from the testimony that there were a lot more days that she beat him that she didn't – she beat him with anything that came to hand, or she would claw him with her fingers. She would kick him.

And, others came. Belinda talked about she is sitting on the toilet in the bathroom, she is watching her mother and Johnny in the bathtub, and her mother is holding him under the water, hollering I am going to drown you, you little bastard. She didn't, she did something, and that is about not drowning him that time, about the nicest thing that we have any record of his mother never did that any more, that the mother never did for him.

Another scene, from his life, the mother had a great big butcher knife coming after him and screaming, at the child and Trudy is in her room watching and she is [1884] screaming that she is going to cut his penis off because he wet the bed or some other crime and Johnny thinks she is really going to do it, and Trudy thinks she is really going to do it, and I think the evidence is, she would have done it if she hadn't been stopped, and stopped by John Garner Penry, Johnny's father.

I think Trudy's testimony was alarmed the only time I ever saw my father hit my mother with something.

On cross examination, Joe Price asked a lot of questions about John Garner Penry when all three of those kids got up on the stand. You mean, your father doesn't know? How could all of this be going on if your father don't know? And, everyone of them said, oh, no, Daddy don't know. Daddy didn't know until much later. Daddy never knew. That is what they said. That is what they believe. Got to believe that, got to have one parent who didn't – well, you know what I mean. You got to believe it. If you don't believe it, it doesn't much matter whether anyone believes it, it [1885] matters now, whether John Penry knew about it. I don't want to say anymore, I want

to leave that on him, when he protected his little boy from his mother.

So, that is child abuse. No, no, no. That is a mild child abuse. That is physical abuse, kicking, scolding, trying to drown him, waving butcher knives, that is brutal abuse, and I guess, though, I don't know, I guess that sort of thing is what Dr. Quijano was talking about in that very moving testimony. I didn't know it was coming, I don't think anyone else did, either. Yeah, I was abused, I think I may have been abused as bad as he was, and you remember I have been sort of yelling at Dr. Quijano, and I jumped all over him, because I don't think he knew what he was talking about when he was talking about a Halstead and trying to pretend that he did know what he was talking about. I was yelling at him a little about child abuse, too, and then, he said, that, so I stopped yelling, pretty fast. I got abused, too, and I think it was maybe as [1886] bad as his. I don't know if I could really believe it was any worse, but, I did ask Dr. Quijano another question and I said, well, did your parents love you? Yeah, but, beating me, my father, I don't think he meant to, but, my father treated me awful. He was a loving father, both of my parents loved me. That helped? Yeah. That helped.

Johnny Penry's mother hated him, hated him. Hated him with all the passion that a normal mother puts in love to her child. She hated him.

I got some mother unhappy scenes about life. Her name for him was little bastard. We know from the evidence that she meant the name the name literally, because he was an illegitimate child, or believed to be. You might expect that from the father, not the mother, the father's

child, but that is not the way it worked in this family. She obviously, felt some kind of a horrible guilt, bitterness or shame that led to Johnny being born. She took it all out on Johnny.

[1887] People have different nicknames for their kids. I have a thirteen year old my favorite nickname for him is you ugly creep. He loves it. He loves it when I call him that because he knows I think he is handsome, and he is the nicest looking boy in the world. He probably is and nothing wrong with that kind of affection, but, I don't think, little bastard was that kind of name, but, I don't think little bastard was that kind of a nickname, and I think, little bastard, was a little bastard. I am going to drown you, you little bastard, that kind of thing.

Pick up in life, and the evidence showed that she kept him locked in his room for self-protection. Maybe she said she did, maybe there were times when he was locked in there for protection, but, I understand a retarded child does need special protection, at night understand, locked in the room, but she kept him locked in there all day, let him out when Daddy came home, let him out when neighbors came over. She did it because she hated [1888] him. She did it out of sheer spite.

Toys. I would sense that a mother is a most loving person even parents that abuse their children, they may not abuse them, they might let them play with toys. Toys for Johnny was something that the mother broke over his head. Remember the little mop and broom, that his Aunt Jane brought him? Jane didn't see what happened to it, but, Trudy, I think Trudy or Belinda did, got broken over his head. And, the next time Aunt Jane came to visit, she

brought him another toy. A little doll. When she put it in front of Johnny he looked at it, put it away, they had a little conversation. Finally, gave it back to her saying Mama might break it, Mama might break it. He didn't play with toys in his house. You saw Aunt Jane burst into tears when I put that doll in front of her on the witness stand. There is the doll. It is faded. An old doll, never been played with. You can tell from looking at it. Aunt Jane was not making it up. None of this ever really [1889] happened, it is all made up.

Well, what is his next little picture? Punishment. We all punish our kids, some times. Shirley had a special punishment for a special little boy. She made him drink urine and eat excrement as punishment. There is no reason to do that, except to humiliate the child. She hated him, she hated him. That's all there is to it. And, the testimony is, it happened a lot of times, and the particular incidents that the sisters remember are not the same. We have Belinda remembering the night in the bathroom when her mother dipped the cup into the toilet and forced Johnny to drink it and we have Trudy remembering the time in the car when the little kid peed in a coke bottle and the mother got back into the car and was furious, forced the coke bottle to him. So, you got two different instances, and is that sheer proof that anything like that every happened? It is all made up. It never happened.

Our last picture from Belinda, the [1890] very time Johnny made a mess in his pants, and he is sitting on the floor eat the mess out of his pants, with a spoon while his mother lies on the bed drinking a Dr. Pepper. Why would a mother do that to a child? Because it was the meanest,

most humiliating thing she could think of to do. That's the only reason. But, of course, it is not true. Its made up. All made up. Its all made up. Nothing ever happened. All the witnesses are lying. Two sisters are lying. Brother lied because he was much younger and all he really gave was the bottom line. She treated us all bad but, she treated Johnny the worse.

Oh, Lucille, the old lady. Remember the old lady in the wicked world? Mr. Price kidded her about that on the cross examination. Remember that? Maybe we all smiled a little bit, but, I got to thinking, you know, she is not wrong. It may be a funny way of proving, but, she is not wrong, and she is at the one that told you about it, that blow to the face [1891] in the high chair from Shirley Penry. She's lying. Aunt Jane is lying, lying about a doll. The toy store brought it in. The neighbor is lying. The neighbor came all the way up here to tell you that she heard the screaming. Fourteen year old baby-sitter, she's lying, too. You remember Carolyn Ward? She's talking about long, long ago. She was a kid. You know, sort of realized she was a kid at the time. I'm not sure. Joe Price, why didn't you tell her? I was only fourteen years old, I didn't have the chance to make that, but, she is still ashamed of it. Ashamed that she didn't tell her. She was in tears. She still feels awful about it, but, out of touch with the family for years, got no earthly motive to lie to anyone, but sure, she's lying. It didn't happen. Shirley Penry didn't hit him, etc.

Well, I got hope, and I have got to believe that if some witnesses ever came to the Texas District Attorney of Trinity County to tell them that there was a child abuse going on, there were witnesses like [1892] this, and they

told stories like this, they would get a little different reception. I hope they would, than, those witnesses got on the witness stand. If they didn't God help them, but, alright, don't believe the witnesses, don't believe the witnesses. She hated him. Got proof in her hand-writing. Part of State's Exhibit Ninety-Nine (A) at the end of Page 4, an application to a state school, filled out by Shirley Penry in her own hand-writing, pretty good hand-writing, too, nothing mentally retarded about her. Spelling is not very good, but, the hand-writing is very good. Johnny is how old now? Nine, almost ten. "I'm trying to get him into the state school." I can't find a one kind thing to say about Johnny anywhere in all of this. He will fight, He will set fires. He will scratch, he is cruel to children, and he is destructive. Of course, that is what Joe Price just said. She tells the truth, that is the way it was. Little psycho-path, she wanted to warn those people at the state school. Such an honorable woman, such an honorable [1893] woman, I will be Joe Price again. Words she used about Johnny. Hateful, feared by classmates, hateful, and otherwise the mother is writing about her nine year old retarded boy. I don't care if it was true. Use the word hateful. There aren't other words? She hated that child. No mother who loves their child ever wrote a piece of paper like this.

Oh, there is one other thing, Got a lot of choices in these applications that you can describe here. Submissive or aggressive. Aggressive. He is exciteable. He is stubborn. Happy, unhappy? She circled happy. Yeah, sure. Sure. Sure, Shirley that little boy was very happy. Maybe she thought he was. Maybe that's why she hated him. Maybe he did have some happy moments, and maybe

that is why she hated him, but, she hated him. Well, Shirley Penry has gone, but she is gone, and her punishment and forgiveness are gone with her to a higher court.

So, what does all this have to do with anything in this case, what Mr. Weeks has [1894] already said, and Mr. Price will state it again, oh, nothing, just nothing to do with what happened in this case.

Dr. Samenow said, too, nothing, nothing, to do with the crime, just a coincidence, although, he kind of choked on that word coincidence. You really think it was coincidence? Do you mean, to tell us, Dr. Samenow, that it has nothing to do with it? I don't know what you mean. I don't know what something to do with it means. Areyou saying, Dr. Samenow, that if he had a loving mother as you and I, that he would commit exactly the same crime? Yeah, that's my opinion. I guess it shows what a really smart man with a really hard heart can get himself to believe if he really, really studies, but, that doesn't make any sense at all, and Mr. Weeks is wrong, about one thing, and then, Dr. Quijano said the opposite. Remember when I calmed down a little bit and I said, Dr. Quijano, I know that I am shouting, at you and maybe you agree, but, you are saying that child abuse is not an excuse for what [1895] he did? Right. Did it have something to do with it? It had something to do with it. That's all I am saying. That's all I am saying. It had something to do with it. We don't know what caused the man to commit a crime like this, we know very well, there is no excuse, no excuse on the face of the earth to justify a crime like this, and it is probably true, this mentally retarded man with his horrible history, that maybe if he had been strong enough to make the right choice, could have been better. A lot of

guilt on Johnny Penry's shoulders, a lot of it. I hear a lot about it. I guess, all I am saying is a little bit bad guilt, Shirley Penry didn't kill anyone, she didn't rape anyone, only she hated him. All I am suggesting to you is that you take some of the guilt, not all of it, not most of it, but some of it and take it off Johnny's shoulders because there were some things that weren't his fault, and if you do that, then, the right punishment is not death, it is life in prison. That's all [1896] That's all I am saying, life imprisonment.

Dr. Quijano, some of the most inspired testimony I have ever heard in the courtroom, told you how you can really, it is possible to overcome something like this, possible. But, I said, it was hard, wasn't it? Yeah. But, it was harder if your parents didn't love you? He said, yeah. It would have been harder if you were mentally retarded? And, he said yeah. Joe Price got up and said he never could have gotten all of those degrees and become a psychologist if you were mentally retarded, right? He misunderstood me. That's not what I meant. Getting a degree and become a psychologist wasn't the hardest thing for Dr. Quijano, that was the easiest thing. The hardest thing that Dr. Quijano did with his history of child abuse, is that he grew up to be the decent, law abiding person. I think he knew what I meant. He did it. Inspired everyone in this courtroom. He is a respected member of his community and Johnny Penry was mentally retarded, and Johnny Penry didn't have a loving parent, and Johnny Penry [1897] is sitting here hoping against hope that maybe he will get life imprisonment. There is a big difference between Johnny and Dr. Quijano,

and I guess a lot of that difference is Johnny's fault, but, some of it isn't.

Well, Dr. Samenow said that child abuse had nothing to do with the crime. It just so happened that the little child who was battered and beatened, tortured by the person who should have loved him most, and did every now and then, tell her he loved her and maybe mixed in with the hate, maybe there was some love there.

You know, just so happens that he grew up and committed a crime and just a coincidence that this guy, obviously, has violence and love so mixed up in his mind, that he can't tell the difference. Any doubt about that at all? Remember Diane Koch's testimony? What a dumb question. Who would ever forget Diana Koch. Do you remember her remember when she was very bravely and very skillfully trying to calm him down, trying to save [1898] herself? Johnny loved it like that. Love is violent. And, she went for her own counsel, she did escape a horrible situation with her life. I am not minimizing what she suffered. The problem, of course, Johnny's mother, taught him that love was excactly like that, that is what she taught him. She was very convincing.

Jackie Howdeshell, the witness you might forget, because all of the others were so vivid, and she, of course, was the lucky one. She was the one who could have been a victim but wasn't. She told her how Johnny asked her three times to marry him, and, I only cross examinated her for about a minute and a half, and my voice was so low, she could hardly hear me. Maybe you don't remember it, but, she said, that – I said, was he a gentle sole? I didn't know him well, he seemed nice. Was he looking for

love? He was looking for love. Did you feel sorry for him? Yeah, I felt sorry for him. She felt so sorry for him the first two times, yes, he asked her to marry him, she doesn't bring [1899] herself to say no, I will have to think about it.

And, then, the horrible, horrible Pam Carpenter thing, and one of the most horrible things about it, about that confession, I am going to tell you in a minute that I don't think that you can take every word of that confession as true, but, the one that rings true, just before he killed her, he said, I love you. Just a coincidence, right? Can't you hear the echo of Shirley Penry, Mama loves you, you little bastard. You know, she loved, nothing about this boy's background makes up love and violence, it just happened that way. Dr. Samenow, can't hear the echo. Dr. Samenow, really thinks that he did exactly what he did. There is truth behind what Dr. Samenow is saying, of course, there is truth behind some of it, and talked him into an absolutely stupid idea for a professor to do that. One truth is that there are a lot of criminals who try to get off with phony stories of child abuse, a lot of them. If you went out there to [1900] the Ellis Unit, you would probably, you know, find an awful lot of people telling you about child abuse, and an awful lot of them would be lying, and the rest would be exaggerating, but, this is not a phony story of child abuse, this one is real. This is true here. How are we going to prove child abuse here? And, we have got another sensible Dr. Samenow, and he said that doesn't excuse it, nothing to excuse it, and he is absolutely right. It does not excuse it, all I am asking for is life imprisonment, I am not asking for an excuse.

Dr. Samenow says nothing to do with it, or the present. He doesn't know what I mean, when I am asking the question. He just, in a way, I could say, do you, lets let the case stand on who knows more about child abuse, Dr. Samenow or Dr. Quijano. Dr. Quijano, never wrote anything about child abuse, Dr. Samenow, has written about how much a child provoked, the parent, but, Dr. Quijano, knows more about child abuse, and I asked him if it had something to do with it, and he said yes. Not an [1901] excuse, and it is not an explanation, and he said, that, and he is right, but, it had something to do with it, and that is why I say to you, there is enough mitigating evidence in this case for you to give a life sentence, let me tell you, let me talk to you for a minute about how that is done, because the Charge that the Judge will read to you, does explain that, and it may not be the easiest part of the Charge, you understand, and I want to go over it with you.

It is the part about the mitigating evidence. You are instructed when you deliberate on the questions posed in the Special Issues you are to consider mitigating circumstances, if any, supported by the evidence, etc. You are to consider it. A mitigating circumstance may include but is not limited to any aspect of the Defendant's character and reference or circumstances of the crime, which you believe is a circumstance of the crime, which you believe could make a death sentence appropriate in this case. You find out that there are any [1902] mitigating circumstances in this case, you must decide how much weight they deserve if any, and therefore, give the consideration to them. This is where, listen carefully, I am going to go

slow, give consideration to them in assessing the Defendant's personal culpability at the time that you answer these Special Issues.

You are going to get just three yes or no questions. You are not going to get any questions about mitigating circumstances. Three questions called Special Issues, and none of them say anything about mentally retarded, none of them say anything about child abuse, but, the Judge told you, he told you that when you answer those questions you are to give affect and consideration to mitigating circumstances. If you determine, when giving affect to the mitigating evidence, if any, that a life sentence is reflected by a negative finding of the issue under consideration, rather than the death sentence, appropriate response to the personal culpability of [1903] the Defendant, then, a negative finding should be given to one of the Special Issues.

Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you get to answer one of the those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct answer is yes. Not the easiest instruction to follow and the law does funny things sometimes, but, it is what it says, and I have taken all of this time with you to make sure that you understand what he says.

If you think that because of this mitigating evidence the man deserves a life sentence, then, there has got to be a no on that verdict sheet somewhere.

Now, Judge, how much time do I have left?

BY THE COURT:

[1904] About twenty-four minutes.

BY MR. SMITH:

Okay. Let me use some of that, I will use about fifteen of those twenty-four minutes to talk about, maybe a little less, to talk about Issue Number One, deliberateness. Okay. The Special Issue ask, when I find it, "Was the conduct of the Defendant, Johnny Paul Penry that caused the death of the deceased, that caused the death of Pamela Carpenter committed deliberately" and, deliberately is the key word, is the word that we are talking about. What does deliberately mean? The Charge does not tell you. I have no fear that someone told you during voir dire, and I wasn't there, and the notes say that Joe Price gave a definition of deliberately, resulting from unhurried, careful, thorough, and cool calculation; not hasty, rash, or thoughtless. Good enough for Joe Price, good enough for me. If it is not good enough for Mr. Price it is good enough for me. Unhurried, cool, through cool calculation, not hasty, rash or thoughtless.

[1905] What I am saying to you, ladies and gentlemen is that the State has not proved that crime, not proved beyond a reasonable doubt that this crime resulted from unhurried, careful, thorough calculations, that it is completely consistent with the evidence, that there is at least reasonable doubt that this was a hasty crime, a crime comitted in a rage, the rage of a man who was stuck with a pair of scissors and struck back. I am not defending

him, I am not saying it was anything other than a horrible, ugly crime, but, a crime and rage is different from a crime committed deliberately and the crime that doesn't get the death penalty. Forget about Johnny Penry, foreget about child abuse, forget about mental retardation. Wouldn't give me the death penalty, if I did not do it, cooly, deliberately, with advanced calculations. Well, there is Joe Price again What do you mean? How can you say what deliberate? Didn't you read the confession? The confession said that he planned to kill her before he went over to the house. [1906] Yeah, I read the confession, but, that part of it, is not true. How do we know that part of it is not true? Well, for starters, contradicts itself. When I cross examined Ranger Cook, and I cross examined him for the second time, I dwelled on some records in the confession, and I suspect a lot of you, are wondering why I was doing that. Why? The words even the confession, I think, are very important here, and you may wonder why I was doing it. Doesn't make my client, knowing this confession, nothing in this case to make my client look very good. It is a horrible thing. I never said that. All I am saying is life in prison is the proper punishment. "If it had not been the chick I stabbed or killed, it would be Jackie or some other chick, but, I don't think it would have been Jackie, because she wouldn't have fought me."

Well, of course, now, the person that you are seeing there is a weird, mixed up mind that thought Jackie Howdeshell wouldn't have fought. That's not what [1907] I am talking about, because it wouldn't have been Jackie, because she wouldn't have fought me. That means, that he only killed Pamela Carpenter because she did fight him. That is the only meaning that you can give those

words. And, of course, that contradicts what he said in the confession that I knew that I would have to kill her before I went over there. They cannot both be true.

There is something that is not true in that confession, either the line where he said, I knew that I was going to have to kill her when I went over there or the line that says, it wouldn't have been Jackie because she wouldn't have fought me, which says, when you think about it, I killed her only because she fought me. Which one is true? I don't have to go into which one is true, I could drop it here. You got two versions, not beyond a reasonable doubt and no deliberateness. End of excuse. I am not going to do that. The second one is true, when he said, it wouldn't have been Jackie because she [1908] wouldn't have fought me. He was saying, a terrible mixed up thing, like a lot of the things he would say, but, he was speaking from the heart. He wasn't trying to fool anyone, he is not smart enough to plant that little suggestion in the middle of this confession, and Maurice Cook, I asked him, he said, yeah, that part seemed sincere, but, that one, didn't come from a yes or no question, couldn't have come from a yes or no question. There isn't a yes or no question that could get an answer in his own words, "She wouldn't have fought me."

Then, why did he say the other things? That probably was a yes or no question, because you almost can't – can't find out that information unless you ask a yes or no question. You do know before you went over there that you were going to kill her, Johnny? How else would you find out? But, I am not going to leave that. Why does Johnny say yes? Well, Johnny said yes, because retarded people say yes. Maybe Johnny says yes because he [1909]

wants to give the answer that the questioner wants, and there is another reason, really, pathetic, stupid reason. Mentally retarded people don't like to seem retarded. Mentally retarded people like to seem smarter than they are. They don't like to say, they acted in a rash, hasty way, like I lost my head, I didn't know what I was doing, I did a horrible thing, he is not smart enough to know that he can get himself the death penalty by not saying that. People are asking the question, Maurice Cook knew that, and Joe Price knew that, and let me tell you right now, that I am not making any criticism of either one of them, they were both sitting there, Maurice Cook asking the questions when Johnny Penry gave that confession, and I never hoped to see a better prosecutor than Joe Price, and I never hope to see a better police officer than Maurice Cook, and they are both people of total honesty, but, their job, their job at that moment was to build the strongest case they could against Johnny Penry. Nothing wrong with that, it is their job, but, I got [1910] to tell you, ladies and gentlemen, that you can't build a case beyond a reasonable doubt, deliberateness, by getting a mentally retarded person to say I did it, deliberately, especially when he says the opposite in the same confession.

Well, I assume when Joe Price gets up, he is going to say I don't even care about that, because there is enough evidence in the house that it was deliberate, all of the activity in the house shows deliberateness, because there was a time, according to the confession, more than thirty minutes, between the time that Pamela Carpenter stuck him and the time that he stuck her.

First of all, with any guy under these circumstances, that doesn't make it deliberate, that doesn't make it cool, unhurried. It was still rash, hasty, horrible, perfectly horrible, but, the horror of rage is not the horror of cold, deliberate planning; but, in any event, for all of the reasons I have just been talking to you, you cannot take it beyond a reasonable doubt that every detail, every word in that confession [1911] is true. I am no longer arguing that you can say the whole thing is not true, Johnny wasn't there, somebody else did it. Obviously, he was there, he raped her, he murdered her, you found that beyond a reasonable doubt. Not disputing that evidence, but, it is another thing to say, that every word in the detailed, minute by minute account is the way that it happened. I cannot believe that you cannot accept it beyond a reasonable doubt, if only because you don't have a reliable witness. Who is the witness telling you all of these wonderful details? Johnny Penry. Forget about everything else. If you wanted to know beyond a reasonable doubt what happened in a half hour in a room and you want a minute by minute account, first this and this, and this and this and this would you go to him? Would you say if he told you, you believe it beyond a reasonable doubt and, if what you have is not a tape recording of his word, but, a statement resulting from answers to questions given by a very smart police officer, helped by a very able District Attorney, both of [1912] whom are trying to build the best case they could, are you going to say that is beyond a reasonable doubt? Are you going to say that it is impossible or that it proved beyond a reasonable doubt that this didn't happen in the struggle, because I suggest to you, ladies and gentlement, if you

put aside the details of the confession a minute, think about what is likely to have happened. The likeliest thing that would have happened is an exchange of blows in the struggle at the very end when he was on top of her she grabbed the scissors, sticks him in the left shoulder, in the back, about where you can reach to, and he, in a rage, perhaps, takes the scissors from her. It is horrible, never been forgiven more, but, the one word that you didn't use is deliberate, the other word that you didn't use, cool, unhurried, resulting from thought, and word that you can use on it is rash, hasty, and the only answer I submit to you, that you can give to Special Issue Number One, is no, and especially if you bear in mind that the State has not proved it beyond a reasonable [1913] doubt.

Let me tell you one thing that strikes me odd in that confession. I am not saying that it is impossible, I am not saying that it couldn't have happened exactly the way the confession says, of course, it could, and, of course, physical evidence was in a large part, known at the time the confessions were taken. So, if Johnny had said something that couldn't have happened, the most natural thing in the world, would be that Ranger Cook would say that has got to be wrong, Johnny, that couldn't have happened. So, it could have happened, some details maybe couldn't have happened, and in fact, that is the heel mark, if it is a heel mark, could have been made by that, but, if you don't believe, put the heel down on the heel mark, but, most of it could have happened, but, is it likely? The thing that is the strangest to me is the part where he gets up and goes and gets the scissors. I killed her with the scissors because she stuck them in me, and that part rings true, that's what I am saying, that's why he did it; but,

[1914] it comes out in the confession, you are almost thinking poetic justice, I will go get the very weapon she used on me. That doesn't sound like this guy. Much more like this guy, to just see a pair of scissors, to grab them, but, he gets stuck with a pair of scissors, he grabs them, and I got to tell you, if doesn't sound like her, but what does she do while he is going to get the scissors? She lies there and waits for him to get back? It is possible, because there is evidence that she had already been seriously hurt, it is possible, but, she was a fighter, she was a very brave woman, in fact, that is in the confession, that could be true, is the part that is very, very convenient, the prosecutor wants to argue deliberately, but, I say it doesn't ring true, it is not true beyond a reasonable doubt.

BY THE COURT:

Got about fifteen, fourteen minutes.

MR. SMITH:

Okay. I am going to use very little of that fourteen minutes on the second [1915] question. Dangerousness. I am going to talk about it a little. And, the first thing I am going to do is read you a very important part of the Judge's Charge.

"In reaching your decision, you must not consider what effect if any, the laws relating to parole may have upon a life sentence." You must not consider it. It is very important, you have been sworn to an oath not to do it, and I am stressing it to you because, of course, I understand the temptation for somebody to say, well, I know, my brother-in-law knows that is what parole would do,

and this is what we got to consider. The Judge has told you that you must not do it. You have heard no evidence on parole. You will hear no argument on parole, not because either side wants to keep anything back from you, just because it is not before you and only say to you, that it would violate your oath, and it would be wrong, it would be deeply and morally wrong for you to say that we are going to have this man killed because we think, we know, or we guess something is [1916] to going to happen with his parole.

Dangerousness in prison. The State proved three instances on three different occasions. May 23, 1981, they took away a pointed board and a weapon called a shank from Johnny Penry in prison. January 26, 1982, poking at another inmate with a long stick. They took away the stick and they took away another shank. June 22, 1983, poking at another inmate with a broken board, and in that case, the other inmate did threaten to kill him. Knowing that I am going to say is going to make those pretty incidents. They are all within the first four years that Johnny was in jail. He has been in for eleven years, almost eleven. No evidence produced of any instance in the last seven years, any time. No evidence that he hurt anyone in any of those instances, and what I am saying to you is, he has not been a model, but, you can tell that he seems to be getting better, and the prison system can handle him. He is not dangerous in prison, and I don't mean by that, maybe some day, they won't have [1917] to take away another pointed board, but, he is not a rape or murder waiting to happen. It is just not true. He is someone the prison system can handle, has handled, and

has handled without any incident, according to the evidence in the last seven years, and will continue to be handled.

I am quite aware that they put on reputation evidence, they had three, four, five guards saying that he is a bad guy, he is dangerous, he has a bad reputation, and of course, I have no way of meeting that evidence. I can't tell you anything they saw or heard. They just said he was dangerous. All I can tell you, I don't think evidence like that, means very much, and I leave it to you to decide whether it is hard for the State to get that kind of evidence in a case like this, whether it is hard for the Defendant to get contrary evidence in a case like this. I believe the correct answer to Issue Number Two is no.

And, let me take what time I have left to talk about my client, and no one is ever going to forget the bad, frightening, thought [1918] but, I guess, my purpose is to try not to make you forget that, you are not going to forget it, but, try to get you to remember that there is another side, there is a human, even a warm and sympathetic, maybe, a special case. There was a little boy, who was very badly treated by his mother and loved his brothers and sisters and they loved him. He was an affectionate little boy. There was a retarded little boy, who tried so hard on all of those tests, but, it didn't do any good. There was a little boy in a bigger boy's body who went to the Mexia State School for the retarded, and maybe she was young and naive, didn't know a psychopath when she saw it, and I am sure that Mr. Price will tell you that she thought that he was a sweet, warm, little boy with the kind of attention and care that God knows that he never got, he may have turned out a lot different.

The little boy in a young man's body, with a young man's strength and sex drive of a young man, committing crimes that God knows most little boys never commit. Jackie [1919] Howdeshell, I don't know why her testimony got to me. He asked her three times to marry him. Didn't have the heart to say no, two of those times. She said, I will think about it, Johnny. Felt sorry for him. Felt so sorry for him that she couldn't say no, and, of course, Joe is going to remind you that she was almost one of the victims. I guess I don't think that makes that story that pathetic. I think that makes it more pathetic.

You are instructed not to decide this case on sympathy. You are not going to. That instruction is at least in part, for the benefit of the Defense, because, of course, the Defense would be sympathetic to the victim. I guess I am not worried about that, not because I know that you are not going to feel the sympathy. I set in this courtroom, too, I am a lawyer and I am a human being, forty-five years old, old enough that I could have kids, who would be, say perhaps, past the age of the young people that suffer most in this world, and everybody I think my age [1920] what if Diana Koch was my daughter? What if Pamela Carpenter was my daughter? What if Johnny Penry was my son? And, I am not worried abou how much sympathy you are going to feel for the first two, those I would be delighted to have you pour out all of the sympathy that human nature could, because I know human nature, and I think there has got to be some left for that guy.

All I am really saying to you, I guess, is not all, I am saying to you right now, is that this man is a human being, made by God in his image, like all of us. He has –

what mental endowment he has, he is a child, he what he did, he deserves very, very severe punishment. You have the right to punish him. It is wrong to kill him and that is almost the last thing that I am going to say.

BY THE COURT:

Got about three minutes, Counsel.

BY MR. SMITH:

Well, where I come from, it is not customary to seek much about your religious faith. I have never considered myself the [1921] most religious man. I live in a community where if you say, you sometimes don't go to church, I get funny looks. I know, that this community is different. I am going to get over my embarrassment, a little, very very briefly. I have really prayed a number of times silently and I am going to pray now aloud.

May God, Almighty God, make – (unable to hear) Amen.

BY THE COURT:

Is that all of your argument?

BY MR. SMITH:

Yes, Sir.

BY THE COURT:

You want to start now, or recess for a few minutes?

BY MR. PRICE:

Five minutes.

BY THE COURT:

Recess for five minutes. You are not to discuss the case among yourselves or with anyone else. We will start back in five minutes.

REPORTER'S NOTE: (WHEREUPON A FIVE MINUTE

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[51:1922] RECESS WAS HELD.)

(JURY OUT)

BY MRS. LIEB:

We urge our objection to the photographs?

BY THE COURT:

Objection is overruled.

(JURY IN)

BY THE COURT:

Alright. Mr. Price, at this time you can make your closing argument.

BY MR. PRICE:

Thank you, Your Honor. Please the Court, Defense Counsel, ladies and gentlemen. I am just going to respond to a few things. The most recent thing I guess, that Mr. Smith had to say. He took away most of my arguments, because he anticipated, I guess, and said that I was going to be saying all of these things and took it away from me.

He brought up something that I want to go back to. Heel mark. I know that has already been resolved. I want to point out to you all something about that. [1923] That came up at the very end of the trial, nobody really had a

chance to respond to it, but, during the trial, do you all recall that Dr. Bruce McClendon was called to the stand by the State, testified estensively, you all asked for some of his testimony. In fact, and we came back and we talked about the heel print on her side? Defense never once asked Dr. McClendon a question about the fibulator. Never once asked him a question about the heel print, and then, Corky Cochran testified. They never asked him a question about the heel print and then, Corky Cochran testified. They never asked him anything about the heel print. Nurse Carr testified. These three people were all in the Emergency Room, and, not once, did the Defense ever ask any of them a question about the heel print or the fibulator. Why you would put a fibulator on the side where the kidney is, that explanation, they never asked anything like that and I think that just needs to be put to rest, and I know that you have in your own minds, because you resolved it, but [1924] since it came up again in argument, here, I wanted to put that to rest. They never once questioned any of that, and then, they bring this guy in from Austin that says it is the fibulator. He doesn't know what it looks like in Livingston, he didn't know what the shape of the fibulator is, he didn't know how the kidney was ruptured, and that came up on the tail-end of the trial, and I wanted to go back to that since it was brought up here again, so, you can think about those things.

He talks about a little boy, a little boy's mind. The evidence that you folks heard here the last two weeks, do you think for a moment, that Johnny Penry has got a little boy's mind? He has got a man's body, there is no question about that, we can see that. We can see him sitting

over there, but, is there anybody on this jury that thinks for a moment, that all of the things that you have heard this man has done since he has been grown, that he has got a little boy's mind? How many little boy's do you know, think like that?

[1925] Mr. Smith, or Defense Counsel, rather, argued at the guilt, they argued, – they switched lawyers but at guilt they argued that he didn't do it, and now, they are saying that he did it. He did it, but, he didn't do it, quite like it was in the confession. It was a horrible crime, but he did it in a fit of rage, before they got up here and told you that he didn't do it. Said, that he is not a murder/rapist, waiting to happen. My Lord in Heaven. How many of you believe that? He has got a steady history of crime, and it is going up all the time. Even when he is in the most maximum security prison that the State of Texas has to offer, he is assaultive, he is dangerous, he manages to get his hands on weapons. They bring in here Dr. Price. No relation I will assure you of that, and he talks about him playing with these puzzles and how it takes him fourteen minutes to put these little blocks in the hole. I wonder how long it took him to build those shanks? Adaptive skills. They may have these numbers over [1926] here on this board, but, you have also heard something else, and that is what Dr. Quijano and Dr. Samenow was talking about, and you haven't heard a single expert disagree with them, when they say it takes more than IQ test numbers, and I think you folks are well aware of that now and you probably know a lot more about IQ tests than you did when you were selected on this jury, but, it takes a lot more than that, and that is common sense.

You know, I made that little comment to Dr. Price about taking Tarazan out of the jungle, and that seemed kind of silly. In the jungle he might be the smartest thing there, he has got total control, he is the kind of the jungle, he can adapt, he knows that if you took him out and give him an IQ test, he would come out at the bottom of mental retardation. He would flunk an IQ test. He would make these numbers over here high, because you wouldn't take into consideration the adaptive skills, and that is what you have got to take into consideration. That's common sense. Makes sense [1927] to you. A lot of folks, are not very well educated. A lot of people. We got twenty million, I believe fifteen million people in the United States, adults that can't read and write, and most of those people would do, very, very poorly on an IQ tests. That does not mean for a moment, that they are all mentally retarded. Just common sense and nowhere in this Charge, are you going to see anything that says that you got to leave your common sense behind. I didn't even plan on talking to you about Special Issue Number One, deliberately, because I didn't think for a moment, that anybody would question the fact that Johnny Paul Penry acted deliberately. You have to go no further than his confession and you will have them. That is still evidence. When you start talking about punishment, one of the first things that you have got to consider is what did he do. What is the crime that he is charged with and been found guilty of? You got to look at that. And, this particular issue directs your attention straight back to it, and I am [1928] going to read out of one of the statements, just simply, that part, and these are horrible things, and I don't want to keep bringing them back up, but, this

addresses that issue. He says, "It was while I was fucking her that I decided to kill her with the scissors, since she stabbed me with them. After I got through, I went over and got the scissors by the kitchen door, came back and sat on her stomach. I told her that I was going to kill her and that I hated to, but I thought she would squeal on me. She didn't say anything. I raised the scissors back over my head and stabbed her in the chest, and she said, ouch, or something and then moaned. I got up and zipped up my pants."

If that is not deliberate folks, there ain't a cow in Texas.

Then another little interesting thing he says right after that, I just noticed this, "She raised up and pulled out the scissors. It looked like it was easy for her to pull out the scissors," That stuck in his mind. Why would that stick in his [1929] mind, that it was easy for her to pull them out? Because he had crammed them in her chest with so much force, it shocked him that she could pull them out, so easily, and that didn't kill her, but, there is not anything here, anything that would indicate he did not act deliberately. If that is not deliberate, I don't know how you could get deliberate. That excludes the fact that earlier in the confession, he says, he knew when he went over that he would have to kill her. You know why? Because he just went to the pen, because his other victim, didn't die, and he went to the pen over that one, and he wasn't going to go back to the pen. He went to that house, not only to rape this young woman, but to kill her and he said it in his statement in the beginning, he goes in the door with a pocket knife out. How much deliberation do you have to have? You take my definition all day

long, I will stand by it, and I will stand by this, too, his words.

Dangerous. Commit acts of violence in [1930] the future. There won't ever be a stronger case presented in this Courtroom, I do not believe, because when you start talking about Special Issue Number Two, there is a limited amount of evidence that you can even use on that issue. One, you can look at the crime itself, how bad was it? This crime, speaks for itself. A horrible crime. If somebody could do this one time, does that tell you something about him? If this was the only murder/rape that he had ever committed, does that tell you something about him? A person who could do what he did, to Pamela Carpenter, planned, beat, stomped, raped, murdered, what does that tell you? If he didn't have another ounce of prior violence in him, what does that tell you about a person that could do that one time? Like Bob Smith said, if he walked over there and cut that woman's throat, if you had nothing before you but these confessions, and the evidence in this case about what he did to Pamela Carpenter, would that tell you that, that man was dangerous? Certainly, it would. Just that one crime, but, you got [1931] much, much more than that. He was on parole for rape, hadn't been out of the penitentiary sixty days for aggravated rape when he committed rape/murder. Tell you something else about his mental capacity. He can learn.

Now, Dr. Samenow said, criminals, most of them, make a choice, and all of us have the ability to make that choice. We can either chose with our lives to do good or we can chose to do evil, and he chose evil. He had a choice, and that was his choice. Hadn't been out of the

penitentiary sixty days for rape, but, he learned something. He learned don't leave a witness around. He killed the next one. You won't have somebody there to testify against you, to identify you, somebody like Diana Koch that came into this Courtroom, while we are talking about her case, and I forget, I want to brag on her. How much guts do you think it took for her to come in here and bear her sole? I asked her to come down and testify about some of the most horrible things that ever happened [1932] to her, in her life, more horrible than most of us will ever have happen to us. She came down here, a little short thing, crawled up on there on that witness stand, she pointed him out, and you could see the pain, you could see the hurt in her, but, she did it. And, why? Why would she put herself through that? Do you think that she thinks that this man is dangerous? Why would she do that? Because she thought it was important that you people know, you people know, Johnny Penry. You know, you need to know not only what he did to Pamela, but, you need to know what he has done to others, and you needed to know that. He has got an entire history, his whole life of crime and violent acts, and they continually do one thing, they get worse, worse, and worse and worse, and they go from picking on kids and trying to stick them with pencils and scissors, even cruelty to animals, to arson, to setting fire to patients, to people. We are not talking about setting fire to a building, we are talking about setting fire to another person. To rape, to capital [1933] murder. We have gone the route. And, here we are. When somebody stands up here and says, this guy is not dangerous. You have heard so many witnesses come in here and say he is dangerous. You have heard

people that have known him for the last ten years. Well, that's been around him and everyone of them says that he is assaultive, he is dangerous and not once did the Defense lawyer ever ask them why you think so. Why do you think Johnny Penry is dangerous? Nobody ever asked that question, because they didn't want to hear the answer. You have got every form of evidence that can be presented in a capital case, you got expert testimony from two psychologists and a psychiatrist back in the Guilt Phase, that is a dangerous man, and I don't think there is any question in any of you all's mind, that he is dangerous. There couldn't possibly be, under all of this evidence.

You have got his prior record, his history of violence, and then, ultimately, you have got this murder, which is a horrible, [1934] horrible crime. It has been a long time, since October 23, 1979. Long time.

Talk about love and hate, being mixed up. That is socio-pathic, psycho-path, no remorse. Have you seen any evidence, any indication of any kind of remorse? He is not capable of it, He is not capable of it, and that is what makes him extra dangerous. We all, or most of us have inside of us, called a conscience, and something that holds us back and keeps us from doing bad acts, and then, when we do we feel bad about it. It kind of keeps us in check. We don't do that again, or wouldn't do anything like that, and certainly, wouldn't do anything worse. That keeps us under control. That is why the doctors told us about the anti-social personality or psycho-patch or whatever, called several different terms, but, it all has one thing in common, and that is no remorse, no conscience,

dangerous, dangerous, and you folks have got a duty and responsibility here on this jury.

This part of the trial is society's [1935] part of the trial. A Defendant has got plenty of rights and they ought to be enforced and they have been. He has an attorney representing him throughout this trial, and that is well and good. He has had the Judge here to make sure that all of his rights and everything was protected. Nothing wrong with that. But, now we are down to society's part of the trial. And, society, has a direct say in this, and when I say society, I am not talking about some fancy group of folks somewhere or another, or some government, I am talking about the people in Walker County, in Polk County, people out there on the streets, like Diana Rearden, like Pam Carpenter. This is society's part of the trial and you got a duty an obligation to society, just as much as you have the responsibility to see that this man receive a fair trial, which you have done, and are doing and I have no question about that, but you also, have a responsibility, an obligation to see that society is protected and society receives a fair trial.

[1936] Talk just a little bit about Shirley Penry. I didn't even intend to bring her up either. I know this man had a bad childhood, there is no question about that, and I am not going to try to white-wash it for one moment, any of that, but I can tell you a few things that might give you something to think about. She's dead, for one thing, and they know it, and they know that she can't come in here and tell her side of this. Another thing that you know from the evidence, is that before, while she was alive, she testified for this man. Now, that she is dead, she is being put on trial. Who was it that took him to the

University of Texas Medical Branch in Galveston? She did. Who was it that got him in the Mexia State School? She did. Bob Smith just read the application there to you a minute ago, and talked about her spelling wasn't too good, or whatever. She may have been a lot of things, but, I don't think for a moment she was what they made her out to be, but, irregardless of that, what you are here to do, is to determine [1937] the appropriate punishment in this case. She is not on trial here. She might should have been at some point in time, and I am like Dr. Quijano and Dr. Samenow, whichever one it was that said, if she did all of those things, that is criminal, no question about that, absolutely, first, lets remember that there are two sides to every story, and we haven't heard her side. You haven't heard it, you have not heard it. You heard a story that first of all said, that Mr. John Garner Penry, the father, didn't ever know anything about this.

Do you recall, we are talking about a period of twelve years, because he was twelve years old when he went into Mexia State School. Twelve years of abuse of the most horrible kind that anybody could possibly ever heard of and imagine, and Mr. Penry, supposedly never knew about it. I don't know how he avoided the stinking bedroom. I don't know how he avoided the claw marks, the cigarette burns, the beatings all of that horrible abuse that they talked about. Just like I don't understand, how [1938] those scars went away. I don't understand that either. Just remind you, that there is a little more to it than what has been presented here. Kind of like presenting some of these records, give a little piece of the record, but, don't give it all to you. You get a little bit of it, a one-sided view of it. How did this kind of abuse go on for ten

or twelve years and never, never once get reported? You got a neighbor that heard screams for weeks. Is that believable? You know we talked about credibility of witnesses, and that is your job to decide about the credibility of these witnesses, and one way of doing that, does it make sense, and the other way, is how does it stack up against all of the other testimony. Does that make sense to you in that a mother of seven children would sit and listen to a child screaming everyday, all afternoon long, weeks and weeks, she said to start with, finally got down to two or three when she realized what was happening. Does that make sense? Those witnesses, you can't put them together and [1939] come out with a consistent story. There's no way you can put those witnesses together. The sister said, he was a normal child at four years of age, somewhere around five, he became retarded. She saw nothing wrong with him at four years of age. Some others have him being horribly abused when he was one, two, and three years old. You can't put those stories together, and if he did get brain damage by getting hit by a shoe, like Mr. Smith so vividly described to you, then how come all of those medical tests do show one ounce of it? Not one bit of brain damage, and if he was burned all the way up on his back and his buttocks, there is photographs of all of that in here, how come those scars went away? If he was burned with cigarettes all over, how come those scars went away? If he was every beatened with belt buckles and all of those kinds of things, and extension cords, where are those scars? The only scars on him are the marks that Pamela Carpenter put on him, that led to his advocation, ultimately, and the

burns on [1940] his legs, which nobody has ever disputed, his own mother reported it, when she carried him to the University of Texas Medical Branch, she reported him having his legs burned when he was a child, and she reported to the broke arm, that had happened when he was like two years old or something. You don't have to be an expert in child abuse, to question some of this. Common sense will tell you a few things, but, whatever Shirley Penry is, was, or whatever, she is not on trial here. Although, the Defense would love for you to concentrate on her and forget about Pam Carpenter, forget about Diane Rearden, forget about what this Defendant has done and is likely to do again, they don't want you thinking about that. They want you thinking about a dead woman that has been dead for ten years, that cannot come in here and testify herself.

And, where is Mr. John Penry? Where is John Garner Penry? Working over at Wal-Mart in Livingston. The best witness there could be. He wasn't two years old when it happened, he can remember. He was [1941] there everyday for twelve years, that this abuse supposedly went on. Where is he?

Think about that.

BY THE COURT:

You got ten minutes, Mr. Price.

BY MR. PRICE:

We talked about child abuse. Three things they brought in here to you. Brain damage. Dispense with that pretty quickly. Absolutely no evidence of brain damage, other than J. Randall Price, that he ordered some tests

that was suppose to tell you what part of the brain was damaged. Didn't do it. Just told him that the whole brain was damaged.

We brought you all of those tests that have been performed, state of the art examination of this man's head, within the past thirty days prior to trial, and it shows absolutely no brain damage.

Then, what do we got? We got mental retardation, and how is that a mitigating factor? How does that reduce his blame? I haven't heard these lawyers, or this lawyer talk to much about that. He slid [1942] around that personally culpability, but that is what that instruction says, and it says it three times on that one page, is that if you are going to consider mitigating circumstances, in order to be one, it has got to be something that reduces his blame in this case, and in this case, he is charged with the murder and rape of Pam Carpenter, and so, you ask yourself, do these things that this lawyer has talked to you about mitigation, do they reduce his blame? You got absolutely no evidence of that. Their own expert they brought in here said, that there is no causal connection. There may be an indirect cause, he says, because of the frustration level or something of that nature. Do you think that the type of crime that you are talking about here has something to do with somebody getting frustrated? Do you think the type of criminal acts that this man has committed has something to do with somebody being frustrated or having a low frustration tolerance? Bull. He functions quite well. Everybody that knows [1943] him, outside of his family, and I got no fault with those folks, I expected that, but everybody that knew him outside of his family, Harold Stubblefield, a dead man,

testified that he worked for him two or three weeks, and he carried him over to the Carpenter residence, said he ran him eight hours that day. Do you remember his testimony was read to you? Didn't notice anything unusual about him. Adaptive skills. He can get along. And, Dr. Quijano, told you what the law is, and what all of these manuals that all of these doctors cite say about mental retardation, but, even for a moment, let's say that he is mildly retarded. Just assume that for a moment. Nobody and there has been no evidence that says that causes a person to commit rape and murder. In fact, just the opposite. The mentally retarded are less likely to commit violent acts than those that are not mentally retarded, so, it can't be a cause and it can't be a mitigating factor, and that leaves us with this child abuse, which is suspect in some [1944] areas and some areas I am sure that was very much so, some abuse, but, likewise, the man that has more experience than anybody in this Courtroom, you know, who he is, he got questioned about that. Mr. Smith knew what he was doing, it just came out a little different. Mr. Smith didn't realize that Dr. Quijano had been the victim of an extreme, extreme child abuse, and he thought that maybe he had had an alcoholic father and just roughed up a little bit, here or there, and so, when he asked him that question, he knew that Dr. Quijano was an honest man, and was going to give him an honest answer, and felt like well, you compare your case to Johnny Penry's how would that compare? His eyes got glassy, he thought about it. Very close, very close question.

BY THE COURT:

Got about five minutes, Mr. Price.

BY MR. PRICE:

That man told you that there is no causal connection between child abuse and rape/murder. If there was any connection [1945] in that area, Diana Rearden could go out here and commit anything that she wanted to now, you know, I have been raped, so I can go do what I want to do. Nobody, no evidence, none of all that there is a causal connection.

I mentioned to you, this is society's part of the trial. I am going to get down to the heart, and then, sit down and shut up.

This has been a long, long ordeal for a lot of people. Long ordeal. I told you in opening argument this began on October 25th, to bring this man to justice. Pamela Carpenter started this battle to bring it to justice when she gave that description and when she put those two puncture holes in his back. She started that battle to bring him before the bar of justice. It is here now, and it is fixing to be handed to you and you do carry a very, very high responsibility and a very serious obligation. You have an obligation to protect society from the likes of Johnny Paul Penry, and you [1946] have an obligation to be sure that the punishment fits the crime, and you know how horrible the crime is and if there is anybody in this room that believes in the death penalty, we know that it is Johnny Paul Penry, because he inflicted it, without giving Pam Carpenter the right to a judge, jury, a lawyer. She didn't get her rights read to her, she got a pair of orange handled scissors buried deep in her chest.

The best example that I can give you of responsibility, and I am going to set down, your responsibilities

in this case, is the facts of the case, and one thing that just kind of is back in the background there, and I want to point this out to you because it comes right back to your responsibility, and your decision in this case. In 1977, this man raped Diana Rearden. A few months later he was examined by Dr. Felix Pebbles, who found that he was sane. He knew the difference between right and wrong, and he was competent to stand trial, but, Dr. Pebbles, went on [1947] and made an additional finding that was really out of the ordinary, and I have never seen this in any kind of a report, he just added it, he said that it is my further professional opinion, that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons. That was written on May 19, 1977. Two years later, and in August of 1979, Johnny Paul Penry was released from custody on parole, less than sixty days later, he murdered and raped Pam Carpenter. You have a responsibility to see that, that never occurs again. The horror that is Johnny Paul Penry is, etched in face, in the sole of Diana Rearden and it is etched in the blood of Pam Carpenter. It must end here and that is your duty and responsibility. Thank you very much.

BY THE COURT:

Ladies and gentlemen of the jury, again, you are reminded that you are not to consider the argument of either of the attorneys as any evidence. At this time, you will retire into the jury room and

* * *

Cause No. 15,977-C

THE STATE OF TEXAS	:	IN THE DISTRICT
vs.	:	COURT OF WALKER
JOHNNY PAUL PENRY	:	COUNTY, TEXAS 278TH
	:	JUDICIAL DISTRICT

REQUESTED INSTRUCTION NO. 30

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant in the above styled and numbered cause, and after the State and the Defendant have rested their respective cases during the hearing on punishment, and prior to the arguments of counsel and prior to the reading of the Charge to the jury, the Defendant hereby requests the Court to instruct the jury as follows:

> Deliberately means a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, planned and premeditated and steady as though allowing time for decision. The term "deliberately" therefore has a meaning different and distinct from the term "intentionally." You have already found that the murder was committed intentionally because intent was an element of the crime of capital murder. You must now decide whether the defendant's conduct causing death was deliberate, as well as intentional. If you have a reasonable doubt about whether his conduct was deliberate or merely intentional, you must answer Special Issue No. 1

"no," even if you are certain that he intentionally caused the victim's death.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court will submit the foregoing Defendant's Requested Instruction to the jury during this the hearing on punishment.

Respectfully submitted,

MALONE and WRIGHT
Attorneys at Law
P.O. Box 6547
Huntsville, Texas 77342-6547
(409) 291-2211

By: /s/ John E. Wright
John E. Wright
State Bar Card No. 22048500

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document has been hand delivered to Mr. Joe Price, District Attorney, in open court, on this the 16th day of July, 1990.

/s/ John E. Wright
John E. Wright

Cause No. 15,977-C

THE STATE OF TEXAS	:	IN THE DISTRICT
vs.	:	COURT OF WALKER
JOHNNY PAUL PENRY	:	COUNTY, TEXAS 278TH
	:	JUDICIAL DISTRICT

ORDER

On this day came on to be heard the foregoing Requested Instruction, and the same having been timely and properly presented to the Court, prior to the reading of the charge to the jury at the punishment phase of the trial, the same is hereby denied, to which the Defendant duly excepts.

SIGNED AND ENTERED this 16 day of July, 1990.

/s/ Joe Ned Dean
JUDGE PRESIDING

CAUSE NO. 15,977-C

THE STATE OF TEXAS	§	IN THE DISTRICT
	§	COURT OF WALKER
V.	§	COUNTY, TEXAS 278TH
JOHNNY PAUL PENRY	§	JUDICIAL DISTRICT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

By your verdict returned in this case you have found the defendant guilty of the offense charged in the indictment, that is, capital murder, which was alleged to have been committed on or about the 25th day of October, 1979 in Polk County, Texas. It is necessary, now, for you to determine, from all the evidence in the case, the answers to certain questions, called "Special Issues," in this charge. The court instructs you further, however, as follows:

1.

The mandatory punishment for capital murder is death or confinement in the penitentiary for life.

2.

The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes," all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes." If the jury unanimously

determines (and only if such determination is unanimous) that the State has proved an issue beyond a reasonable doubt, then the Foreperson will so record the jury's answer to such issue by signing his or her name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes," then such juror should vote "No" to that Special Issue in the jury's deliberations.

If ten (10) jurors or more vote "No" as to any Special Issue, then the answer of the jury shall be "No" to that issue, and the Foreperson will so record the jury's answer by signing his or her name to the finding reflecting such answer on the form provided for that purpose.

If there is any Special Issue on which the vote of the jurors is not unanimously "Yes" or not at least ten (10) in favor of an answer of "No," then there shall be no answer for that Special Issue and the Foreperson should not sign his or her name to any answer form for that Special Issue.

3.

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second

part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

You are instructed that the defendant may testify in his own behalf if he elects to do so, but if he chooses not to do so, that fact cannot be taken as a circumstance against him nor prejudice him in any way. The defendant has elected not to testify in this punishment phase of trial, and you are instructed that you cannot and must not refer to nor allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the defendant.

In reaching your decision, you must not consider what effect, if any, the laws on parole will have upon a life sentence.

No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

4.

You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on

any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all the evidence before you and in answering the special issues.

The Special Issues, with forms for your answers, are as follows:

SPECIAL ISSUE NO. 1

Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Douglas R. Massey
FOREPERSON

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No."

_____
FOREPERSON

SPECIAL ISSUE NO. 2

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Douglas R. Massey
FOREPERSON

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No."

_____
FOREPERSON

SPECIAL ISSUE NO. 3

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Douglas R. Massey
FOREPERSON

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No."

FOREPERSON

FILED: 7/16/90 5:00 P.M.

/s/ Joe Ned Dean
JOE NED DEAN,
PRESIDING JUDGE

VERDICT

We, the jury, return in open court the above answers as our answers to the Special Issues submitted to us, and the same is our verdict in this case.

/s/ Douglas R. Massey
FOREPERSON

TEXAS COURT OF CRIMINAL APPEALS

JOHNNY PAUL PENRY,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from Polk County
No. 71,130

OPINION

In July 1990, a Walker County[1] jury found appellant, Johnny Paul Penry, guilty of the capital offense of murder in the course of committing aggravated sexual assault.[2] *See* Tex. Penal Code § 19.03(a)(2). The jury answered the special punishment issues affirmatively, and the trial court assessed punishment at death. *See* Tex. Code Crim. Proc. art. 37.071(b).[3] Appeal to this Court is automatic. *See* Article 37.071(h). On appeal, appellant raises 135 points of error, but he does not challenge the sufficiency of the evidence to support the jury's finding of guilt.[4] We will affirm.

COMPETENCY TRIAL

Appellant maintains in points of error 121-123 that the trial court abused its discretion when it denied his

[1] Appellant's trial was held in Walker County on a change of venue from Polk County.

[2] Appellant was found guilty of the same offense in a previous trial, but that conviction was reversed by the United States Supreme Court. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

[3] Unless otherwise indicated, all references to articles are to those in the Texas Code of Criminal Procedure.

[4] The facts of the instant case may be found in the discussion of point of error 114a, *infra*.

motion for change of venue raised at the competency trial.[5] The motion and accompanying affidavits alleged that appellant could not get a fair trial in Walker County due to pretrial publicity. He argues that the trial court's failure to change venue violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

At the venue hearing, appellant presented evidence of various articles appearing in four Texas newspapers, *The Houston Chronicle*, *The Houston Post*, *The Dallas Morning News*, and *The Huntsville Item*. The majority of the articles appeared in January and February 1989, when appellant's original case[6] was before the Supreme Court, and again in June and July 1989, when the Supreme Court issued its opinion reversing his original conviction. This was more than six months prior to the May 1990 competency trial. Only three articles were printed in February and March of 1990. Two of those articles dealt with the original change of venue from Polk to Walker County; the third article was a letter to the editor.

Hal Ridley, a criminal-defense lawyer practicing in Walker County, testified for appellant. He suggested that the public was already familiar with the case and was familiar with the fact that appellant had already received a death sentence which had been overturned. Ridley did admit, however, that many of the newspaper articles were favorable to appellant. He further stated that

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[5] Venue had already been changed from Polk County to Walker County.

[6] *See* footnote two.

because so many potential jurors were connected with the Texas Department of Criminal Justice (T.D.C.J.),[7] the potential jurors could not help being prejudiced against appellant. The State presented only its controverting affidavit to rebut appellant's assertions.

The trial court took judicial notice of the voir dire examination of the competency venire. During voir dire, it was determined that twenty-one veniremembers had heard something about the case, most having read about it in their local newspaper. Only two veniremembers stated that the information they had obtained would bias their opinions, and they were excused for cause.[8] Of the remaining panelists who were questioned about their knowledge, three were aware that appellant was a death-row inmate but did not know any details of his offense; three others knew only that he had killed someone; one knew there had been a change of venue; another knew appellant's name and was aware that he had done something "against the law;" and one *thought* he may have seen appellant as an inmate in the prison in Huntsville.

Article 31.03(a) provides that a change of venue may be granted on a defendant's motion if "there exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial." However, merely because a case has been well publicized in the media does not automatically

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[7] Formerly the Texas Department of Corrections.

[8] Venireperson Carpenter knew the victim, and venireperson Farris could not "spiritually set aside" her opinion. Venirepersons Mason and Bruner had also read about the case but were excused for other reasons.

establish prejudice so as to require a change of venue; due process does not require that jurors be completely ignorant of the facts of the case. *Narvaiz v. State*, 840 S.W.2d 415, 428 (Tex.Crim.App. 1992); *Ransom v. State*, 789 S.W.2d 572, 579 (Tex.Crim.App. 1989). Due process requires only that a juror lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Morris v. State*, 488 S.W.2d 768, 771-72 (Tex.Crim.App. 1973).

A defendant seeking a change of venue on grounds of pretrial publicity must show the existence of such prejudice in the community that the likelihood of obtaining a fair trial is doubtful. *Narvaiz*, 840 S.W.2d at 428. An appellate court will not reverse a trial court's decision to deny a change of venue absent an abuse of discretion. *Id.*; *Hathorn v. State*, 848 S.W.2d 101, 109 (Tex.Crim.App. 1992).

Appellant has shown us nothing in the record that demonstrates that the trial court's denial of his motion to change venue was outside the realm of reasonableness. *See Narvaiz*, 840 S.W.2d at 428. No member of the competency venire not struck for cause had formed an opinion as to appellant's competency or guilt. Points of error 121-123 are overruled.

Points of error 124 and 125 aver that the trial court erred in refusing to conduct individual voir dire and in refusing to sequester the jurors at the competency phase even though "a large number of the panel members had been exposed to extensive publicity." However, because appellant has provided no argument or authority regarding these issues, we consider the points inadequately

briefed and as presenting nothing for our review. Tex. R. App. Proc. 74(f); *Robinson v. State*, 851 S.W.2d 216 n.4 (Tex.Crim.App. 1991). Points of error 124 and 125 are overruled.

In points of error 126-131, appellant alleges that the trial court made numerous reversible errors during jury selection at the competency trial. Specifically, he contends the trial court erred in overruling his challenges for cause because the veniremembers had biases or prejudices against him. *See* Article 35.16(a)(9).

The denial or grant of a challenge for cause is within the discretion of the trial court and will not be overturned absent an abuse of that discretion. *Mooney v. State*, 817 S.W.2d 693, 701 (Tex.Crim.App. 1991). We examine the record as a whole to determine whether there is support for the trial court's decisions, and, in doing so, we give great deference to the trial court. *Satterwhite v. State*, 858 S.W.2d 412, 415 (Tex.Crim.App. 1993). The trial court is able to consider such factors as demeanor and tone of voice that do not come through when reviewing a cold record. *Mooney*, 817 S.W.2d at 701. Appellant was granted no additional peremptory strikes.

In point of error 126, appellant complains that prospective juror Taylor was biased because he knew appellant was a death-row inmate and felt psychologists were trying to run a "con game" to help appellant avoid the consequences of his actions.

There is no requirement in our law that jurors be completely ignorant of the facts of a case. *Cockrum v. State*, 758 S.W.2d 577, 589 (Tex.Crim.App. 1988); *Nethery*, 692 S.W.2d at 694. The sole question is whether a juror

can put aside prior knowledge and opinion and render an impartial verdict. *Cockrum*, 758 S.W.2d at 589; *see also Murphy v. Florida*, 421 U.S. 794, 799-800 (1975). During voir dire, Taylor stated that he knew appellant was an inmate on death row, but also that he knew no facts about the crime. Moreover, Taylor assured the trial court and the attorneys that he had formed no opinion as to appellant's competency and was not affected by his knowledge of appellant's death-row status.

Next, Taylor initially stated that he believed psychiatrists were trying to run a "con game" by testifying that defendants are incompetent. He believed that the "business of competency" was a way for a defendant to avoid being prosecuted. However, Taylor also stated that he would be able to put that opinion behind him and render a competency verdict strictly on the evidence, including psychiatric evidence, presented.

There is a distinction between prejudice on the part of a juror and the mere entertaining of an opinion. *Kemp v. State*, 846 S.W.2d 289, 299 (Tex.Crim.App. 1992). Simply because Taylor stated he felt some defendants might attempt to feign incompetence did not mean he had formed a conclusion as to *appellant's* competency. Taylor was not disqualified as a matter of law from serving as a juror in this case. We see no abuse of discretion on the part of the trial court. Point of error 126 is overruled.

In point of error 127, appellant asserts that prospective juror Watkins should have been disqualified as a juror because he knew appellant was a death-row inmate through a bulletin he received at work. Appellant argues in points of error 128 through 131 that, due to media

coverage, prospective jurors Moore, Massey, Weinzierk, and Ritchey each knew that appellant had killed someone and, therefore, they should also be disqualified. Massey also knew that appellant was on death row and that venue had been changed from Polk County.

All these jurors stated unequivocally that they had formed no opinions regarding appellant's competency. They all stated that they could set aside their knowledge and render a verdict based strictly on the evidence. As we have previously stated, the mere fact that a prospective juror has received some information about the accused's case through the news media does not automatically disqualify him from serving as a juror. *Cockrum*, 758 S.W.2d at 589. Because each of these jurors assured the trial court that he or she could put aside prior knowledge and render an impartial verdict, the trial court did not abuse its discretion. *Id.* Points of error 127 through 131 are overruled.

In points of error 117-119, appellant complains that the burden of proof at the competency hearing should have been placed on the State. Appellant argues that placing the burden to prove incompetency on him violated § 2.05 of the Texas Penal Code, the Eighth Amendment to the U.S. Constitution, and the due process guarantees of both the U.S. and Texas Constitutions.

At trial, appellant objected to the burden of proof only on the basis of due process. Because his trial objection does not comport with the Penal Code and Eighth Amendment issues raised on appeal, he has not preserved them for our review. Tex. R. App. Proc. 52(a); *Barnes v. State*, 876 S.W.2d 316, 325 (Tex.Crim.App. 1994);

Johnson v. State, 803 S.W.2d 272, 293 (Tex.Crim.App. 1990). Therefore, we shall address appellant's argument only as it relates to due process.

A defendant is presumed competent and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence. *See* Article 46.02, § 1(b). The burden of proof in a competency hearing is on the defendant. *Barber v. State*, 757 S.W.2d 359, 363 (Tex.Crim.App. 1988).

In *Medina v. California*, 112 S.Ct. 2572, 2579-80 (1992), the Supreme Court stated:

> Once a State provides a defendant access to procedures for making a competency evaluation . . . we perceive no basis for holding that due process further requires the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial.
>
> * * *
>
> The Due Process Clause does not . . . require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused. Consistent with our precedents, it is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial.

(Citations omitted.) *Medina* is plainly applicable to the instant case.

We hold that Article 46.02 provides adequate procedures to protect a defendant's right to due process at a

competency trial. The trial court did not err in denying appellant's requested instructions to place the burden of proof on the State. Points of error 117-119 are overruled.

In point of error 120, appellant complains that the trial court erroneously refused to submit his requested instruction No. 5, which would have informed the jury of the effect of a finding of incompetence. He argues that the absence of the requested instruction rendered the finding of competence unreliable, thus violating his Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment. The trial court charged the jury according to the requirements in Article 46.02. Appellant cites us to no other authority for his argument.

Appellant did not raise any constitutional objections regarding the submission of his requested instruction. Because his trial objection does not comport with the issues raised on appeal, he has preserved nothing for our review. *Barnes*, 876 S.W.2d at 325; *Johnson*, 803 S.W.2d at 293. Point of error 120 is overruled.

In points of error 115 and 116, appellant contends the trial court erred in failing to instruct the jury on the meaning of the statutory phrase, "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." Specifically, he complains that the trial court refused his request to define the terms "rational," "reasonable," and "understanding," which, he claims, are vague and indefinite.

The test to determine competency is "whether [the defendant] has sufficient present ability to consult with

his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. U.S.*, 362 U.S. 402, 402 (1960). Texas has codified this standard in Article 46.02, § 1(a). Neither the Supreme Court nor our statute requires any definition of the terms found therein.

We do not believe that the terms "rational," "reasonable," and "understanding" have become so technical that they are legal terms of art requiring the trial court to define them. "Where terms used are words simple in themselves and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms, and under such circumstances such common words are not necessarily to be defined in the charge to the jury." *Russell v. State*, 665 S.W.2d 771, 780 (Tex.Crim.App. 1983) (citations omitted). The jury was entitled to give the terms their ordinary meanings. The trial court did not err in failing to instruct the jury on the definition of these terms. Points of error 115 and 116 are overruled.[9]

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[9] Appellant also argues that the vagueness of the terms caused him harm because of the facts of his case. We disagree. Appellant failed to demonstrate how his case differed from any of the myriad of competency trials that take place each year. Further, he cites us to *Penry v. Lynaugh* as authority governing competency trials. After a careful review of the case, we conclude that it is not controlling authority in the case of a competency hearing.

CHANGE OF VENUE

In his 35th point of error, appellant complains of the trial court's overruling of his motion for a change of venue of the trial on the merits. As in his previous hearing at the competency trial, appellant alleged that so great a prejudice existed against him in Walker County that he could not obtain a fair trial. Specifically, he complained of extensive prejudicial publicity, the proximity of the community to the situs of the crime, and the fact a number of Walker county residents were employed by the T.D.C.J. He asserts that the alleged error violated his rights under the Sixth, Eighth, and Fourteenth Amendments.

The authorities and standard of review for a denial of a motion to change venue for the trial on the merits are identical to those set out in points of error 121 through 123, *supra*. Therefore, we need not repeat them.

The hearing on the motion took place on May 22, 1990. The evidence presented showed that the population of Walker County was 55,206. The T.D.C.J. employed 5,168, although not all employees were residents of Walker County. The *Huntsville Item*, *Houston Post*, and *Houston Chronicle* were shown to have reasonably large circulations in the county. Approximately seventy articles from those papers were admitted in evidence. The articles covered a time range of approximately 660 days. About fourteen of the articles appeared in the six months preceding trial, and they dealt mainly with the original change of venue from Polk County and competency matters. Also admitted in evidence was the partial script of a news broadcast out of Bryan and two videotapes of news

broadcasts out of Houston, dated October 19, 1988, and January 1, 1989. A review of the record reveals that the majority of news reports centered around the time appellant's case was before the Supreme Court.

Appellant called five witnesses to testify. Professor Raymond Teske presented an opinion poll comparing the percentage of people aware of the case and willing to assess the death penalty in Walker County versus Galveston County.[10] Attorneys William Habern, Kay Douglas, and Jane Swanson testified that they did not believe appellant could receive a fair trial due to the bias in the community. Finally, Professor Edward Bronson testified

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[10] The opinion poll was designed to determine the percentage of people aware of the instant case. Initially, respondents were asked whether they were aware of a case involving appellant. Thirty-nine out of 100 respondents in Walker County answered "yes." If the respondent answered "no," the pollsters then gave specific facts of the case including:

> (1) [Appellant] has been accused of the murder of Pamela Mosley Carpenter, a housewife who was raped and stabbed with a pair of scissors in Livingston in 1979.
>
> (2) Also, [appellant] was convicted and given the death penalty in 1980 for the death of [Carpenter]. Later, the Supreme Court reversed the conviction.
>
> (3) Mark Mosley, one of her older brothers, was a former professional football player.
>
> (4) Finally, [appellant] is considered mentally retarded.

The respondents were then asked whether they were aware of the case. Teske admitted that the information given to the respondents could likely influence their response.

regarding the potential prejudicial effect created by the news media.[11]

In rebuttal, the State called six witnesses who expressed the opinion that appellant could obtain a fair trial in Walker County. The witnesses included Oscar Thorn, the Walker County Tax Assessor-Collector; Dale Meyers, Walker County Sheriff; Randy Ellisor, the manager of Huntsville Cable T.V.; Randall Davis, a local insurance agent; Travis McDonald, an assistant prosecutor for the Prison Prosecution Unit in Huntsville; and Judge Frank Robinson. Each testified that he had heard very little, if any, talk about the case and had seen little newspaper coverage. McDonald also testified that he did not believe that employment by T.D.C.J. would affect a juror's ability to fairly decide a criminal case.

The trial court further took judicial notice of the voir dire that occurred at the competency trial and the general voir dire held the day before the instant hearing. At the general voir dire, when the trial court asked the ninety-six prospective jurors if anyone had heard or read about the case, approximately forty raised their hands. During the State's voir dire, after discussing the case in more detail, twelve more people also indicated that they had heard or read about the case. Four of these people were

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[11] Included in Bronson's qualitative report were summaries of the number of times words such as "death row," "death penalty," and "capital murder" were referenced in the newspaper articles. This analysis did not take into consideration the context in which the words were used. Bronson admittedly did not do a qualitative analysis on words such as "mental retardation" and "child abuse."

excused because they had already formed opinions regarding appellant's guilt. The trial court denied the motion to change venue.

Appellant re-urged his motion after the completion of the voir dire, giving the trial judge an additional barometer of the community climate. Fourteen of the jurors were excused because they had formed opinions that appellant was guilty. All other veniremembers familiar with the case stated they could try the case strictly on the evidence adduced at trial. Appellant used his fifteen peremptory challenges plus two additional challenges granted him by the trial court. Of the twelve jurors selected for trial, five knew nothing about the case; six heard or read very little and none knew of the details or purported facts; and, finally, one had some detailed knowledge but stated that he had formed no opinion and could afford appellant a presumption of innocence. The trial court again denied the motion.

After a careful review of the record, we conclude that appellant has failed to show that publicity created a prejudice so great as to prevent a fair trial. *See Faulder v. State*, 745 S.W.2d 327, 338-39 (Tex.Crim.App. 1987); *Freeman v. State*, 556 S.W.2d 287, 294-96 (Tex.Crim.App. 1977)[12] Further, appellant sets forth no evidence to show that employees of the T.D.C.J. would be inherently biased jurors. It appears that appellant was tried by jurors who had no opinion as to his guilt and that he received a fair trial.

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[12] Overruled on other grounds by *Cuevas v. State*, 641 S.W.2d 558, 560 (Tex.Crim.App. 1982).

As this Court has previously noted:

> Our courts cannot and do not operate in a vacuum. Courts deal with people and crimes which are newsworthy. To require a trial of jurors who had never heard of a highly publicized crime would be impractical if not impossible. Certainly, it was never intended that jurors were to be selected from those who did not read newspapers or keep up with current events through other media. Jurors selected from such a group, if there are enough to be called a group, would not be representative. To hold otherwise would be to hold that the perpetrator of a very highly publicized crime such as the assassination of a president or any widely known person could never be tried.

Morris, 488 S.W.2d at 771-72 (citations omitted).

The trial court did not err in denying appellant's motion to change venue. Point of error 35 is overruled.

VOIR DIRE

In twenty-four points of error (points 36 through 59), appellant complains that the trial court erred at voir dire. The record reveals appellant exhausted all his peremptory challenges and was granted two additional strikes. After his request for more peremptory strikes was denied, appellant identified several venirepersons as objectionable jurors who were seated on the jury. Error, if any, was preserved. *Demouchette v. State*, 731 S.W.2d 75, 83 (Tex.Crim.App. 1986). However, because the trial court granted appellant two additional peremptory strikes, we

can not reverse appellant's conviction unless he demonstrates that the trial court committed error in discharging *three* jurors.[13] *Martinez v. State*, 763 S.W.2d 413, 425 (Tex.Crim.App. 1988); *Rector v. State*, 738 S.W.2d 235, 247 (Tex.Crim.App. 1986). Appellant challenges twelve veniremembers. Because we hold the trial court did not abuse its discretion regarding ten of those venirepersons and because appellant was given two extra peremptory strikes, appellant can show no harm. *See Chambers v. State*, 866 S.W.2d 9, 23 (Tex.Crim.App. 1993). Therefore, we need not address the points of error pertaining to prospective jurors Falknor and Anderson (points of error 45 through 47, 52, 53 and 59).

1. Challenges for Cause

In points of error 36 through 53, appellant posits the trial court erred in overruling his challenges for cause because the venirepersons in question held prejudices against aspects of the law upon which he was entitled to rely. *See* Article 35.16(c)(2). The authorities and standard of review for a challenge for cause are identical to those set out in points of error 126 through 131, *supra*.

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[13] The State contends that appellant did not preserve error because he did not name any objectionable jurors. We disagree. By agreement, no peremptory strikes were taken until after voir dire of the entire venire was complete. Appellant designated his objectionable jurors by requesting extra strikes for particular veniremembers prior to the taking of the peremptory strikes. The trial court denied appellant's request and these veniremembers eventually sat on the jury.

In points of error 36, 37 and 39, appellant argues that prospective jurors Waggoner, Blair, and Lawson could not distinguish between the terms "deliberate," as used in the first punishment issue, and "intentional," the culpable mental state of the crime:

Prospective Juror Waaaoner:

> [By the Prosecutor, after a recitation of various hypotheticals and explanations of the differences between the two terms]: Would you follow the court's instructions and answer this question based on the evidence and not simply because you had already found him guilty? Could you do that?
>
> A. Yeah. I mean, I could do that.
>
> Q. Would you answer [the first special issue] based on the evidence?
>
> A. Yes.
>
> Q. Okay. And just because you found him guilty, you are not going to come along and answer this one yes automatically, are you?
>
> A. No.
>
> * * *
>
> [By Defense Counsel]: When we are talking about special issue number one, let's say, in your mind, do you see that there is – or there is a distinction between intentional versus deliberate?
>
> A. If so, I don't know what it is.
>
> Q. Let me ask you this. If you had gone back and, of course, you realize you don't get to these particular questions until you have already

found somebody guilty of intentionally committing a murder . . . If you had already done that, and just because you had answered that somebody had committed a capital murder, that they intentionally and knowingly killed . . . just because you have answered that he had done this, and he was guilty of that crime, does that mean in and of itself that you automatically answer special issue number one that he deliberately did that?

A. No.

Q. Okay. So, there is a distinction between deliberate and intentional now in your mind?

A. Well, I don't know exactly what it would be. I'm sure there is a fine line.

Q. You just don't know yourself, you can't verbalize it?

A. I mean, if I told someone I intentionally did something, I mean, I could turn around and say I deliberately did it, and I would mean the same thing by it.

Q. In your mind, though, can you think of any situation where there would be a distinction?

A. No.

* * *

Q. Well, the State says intentional in one, or somebody intentionally commits a murder.

A. Right.

Q. Then they turned right back around and they use a different word, deliberate, in special issue number one.

A. Right. I am sure there is a reason for their different terminology.

* * *

Q. You say you still don't see the distinction?

A. No, unless you explain it some other way.

* * *

Q. Okay. Again going back to the special issue, intentional, if you found a person guilty of intentionally committing capital murder, that is, in and of itself, sufficient to you, you don't have to think, if he intentionally did it, that is good enough for me, I can answer special issue number one yes?

A. There is more to it than that.

Q. With the reasonable expectation that the death of the deceased or another would result?

A. Yes. You have to be able to –

Q. Well, if he intentionally killed somebody, wouldn't you think that you could reasonably expect the death of the deceased to result?

A. Yes.

Q. Okay. So, now, back to the same question on intentional. You have answered guilt or innocence, you have found him guilty.

A. If I found him guilty, I would answer number one.

Q. Automatically?

A. No.

Prospective Juror Blair:

[By Defense Counsel]: Alright. And, then, you come back and we have a second part of the trial, where evidence may or may not presented [sic], but, anyway, you have already found that he intentionally committed the particular murder.

A. Yes, sir.

Q. Now, based upon your strong viewpoint, do you believe that the question Number One is automatically answered, just because he intentional [sic] kills somebody, would that be answering Number One, right away?

A. Yes, sir, pretty much.

Q. And, there is no distinction in your mind between deliberate and intentional, they are one in the same, if the man committed a murder in the course of committing some other crime?

A. Yes, sir.

* * *

Q. Question Number One is answered, I don't need any other information, I do not want any, because intentional and deliberate is [sic] one in the same, you guys can sit here and talk about the Legislature, and talk about it all day long, but Question Number One is answered, boom?

A. Basically, unless there is something I just can't think of, I would say yes, sir, that's right, you have no reason to be there.

* * *

[By the State]: Okay. With respect to that, and I gave you probably a poor example of the difference between deliberate and intentional awhile ago, when I said, about the guy holding the pistol, cocked and looks off and sees a little movement and pulls the trigger. That could be compared to a guy facing him with a trigger, with a gun on him, getting the money and he is thinking that he is the only witness here, I ain't going to leave him alive, he gets the money and he goes boom, you know, looking him dead on. You see what I am talking about. Now, you may consider both of those deliberate and both of those intentional, that's not my point, to try to convince you one way or the other. My point is, though, is that there is a distinction, sometimes, or most of the time, maybe both would be true, most of the things that we have been talking about intentional, and likely to be deliberate, and vice versa. What that question though, it does use a different term, and it is worded a little different, and ask you to answer that question based on the evidence, and the fact that the State has a burden of proof on all three of these questions to prove that the answers was [sic] yes, beyond a reasonable doubt, and in order to answer it, you must be convinced by the evidence, not by the fact that you found him guilty earlier, but, by the evidence, and if you were convinced again that it was deliberate and also intentional, so be it, but, could you do that?

A. Yes, sir.

* * *

[By Defense Counsel]: That is why I was asking you the question about intentional versus deliberate. That extreme feeling that you feel is such

that you have told me that you would answer Question Number One automatically, because you already found the man doing that extreme penalty that you feel very deeply about?

A. Here again, I would have to hear the facts, okay? But, I do have a feeling, you know, you shouldn't be there, or you shouldn't be in someone's home or in their store or something. I mean, you shouldn't do that. You know, that's normal, I would think.

* * *

Q. Would there be any real decision upon your part, after having first found somebody guilty, to answering these questions in any other way but the way that you feel?

A. I don't think so. You know, I don't think I would have any problem.

Q. Do you feel like that they would automatically be answered yes?

A. Not if you read the question.

Q. No. In your belief?

A. No, I don't think it would be automatically answered yes.

Prospective Juror Lawson:

[By Defense Counsel]: Okay. If I go up and – it is kind of tricky there, intentionally and deliberately is the same in your mind. In other words, what you are saying, if you have it all set up, and the Legislature goes back and talks about all of these words, but that deliberately and intentional are the same thing, no matter what you guys talked about, in your mind?

A. Yes, sir.

* * *

Q. Is there something that I could give you that would help show you the distinction? Is there some way I can explain it to you different? Mr. Lawyer, you are sitting there all day long and talking at this time about it, you are just splitting hairs, and that doesn't make any sense to me.

A. Well, the way – the only thing I can say, the way the two words are used, based on the same definition, but they are used different, in different ways to the defendant. It all goes back to the same thing.

* * *

Just used different. The same definition to me.

* * *

[By the State]: [W]ith respect to the first issue up there, where it asks about was the conduct done deliberately, would you answer that question based on whatever your definition of deliberate is, but would you answer that question based on the evidence that was before you as opposed to just answering it because you had already found the man guilty? In other words, I find him guilty, I'm going to automatically answer this issue yes. That is one proposition. The other proposition would be, I have found him guilty based on the evidence, and then when I get down to this first issue, I'm going to answer that issue based on the evidence, too. I am not going to answer just because I have found him guilty. Which way would you do that?

A. I will treat this just like the whole trial.

Q. You would answer it just on the evidence?

A. True.

Q. It wouldn't matter that you had already found him guilty or not, you are going to look at the evidence?

A. Look at it as all over the trial.

Q. And you would look at that question, then, I take it, and whatever in your mind deliberate meant, that is what you would do, you would apply it to whatever the evidence was?

A. Yes, sir.

* * *

Q. Okay. But the bottom line is, irregardless [sic] of what definition you attach to the word deliberately, would you answer that first question totally on the evidence, just on the evidence, and not for any other reason? Could you do that?

A. Yes, sir.

* * *

[By Defense Counsel]: Because you have already found that person had already intentionally committed a crime does that mean that you can answer number one automatically yes, because you have already found that he intentionally committed a crime?

A. No, sir.

After reviewing the entire voir dire for each veniremember, it is apparent that they were confused and equivocating in their responses. It is not error for the trial court to deny a challenge for cause to veniremembers

who give equivocating answers on whether they could answer a punishment issue in the negative. *Sattiewhite v. State*, 786 S.W.2d 271, 281 (Tex.Crim.App. 1989). In the instant case, each prospective juror stated that he was capable of following the law and answering the punishment issues impartially. Therefore, we hold the trial court did not abuse its discretion by overruling appellant's challenges for cause. *Id.*; *see also Mooney*, 817 S.W.2d at 701. Points of error 36, 37, and 39 are overruled.

In point of error 38, appellant contends that prospective juror Blair was biased against the law pertaining to special issue three concerning provocation.[14] Appellant asked Blair the following:

> Q. Assuming that you are convinced beyond a reasonable doubt that the defendant deliberately murdered a woman during the course of intentionally raping her and you are convinced beyond a reasonable doubt that he is a violent person, who will pose a threat to society, and there was no mitigating evidence offered on his behalf, assume that when the defendant was raping the woman, she provoked him in some sort of way, anyway, that you can, at all, would anybody ever be able to convince you that it was reasonable for the defendant to respond to the provocation by deliberately taking her life?

After Blair blurted out his negative answer, the State objected that the question was improper because it

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[14] "[I]f raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Article 37.071(b)(3).

sought to bind the juror to a specific fact situation. The trial court sustained the objection.

Without deciding whether a defendant may base a challenge for cause on a question sustained as improper, we hold no error occurred here. During the State's voir dire, Blair stated he could follow the law and base his answer to the third special issue on the evidence adduced. The record reflects further that the State was permitted, without objection, to read the indictment to Blair. Given these facts, we cannot say there is anything wrong with Blair visualizing himself as satisfied beyond a reasonable doubt that the defendant's killing of the deceased was not a reasonable response to any provocation. *Cf. White v. State*, 779 S.W.2d 809, 818 (Tex.Crim.App. 1989). Blair did not state, and was not asked, how he would answer given a different fact situation. The trial court did not abuse its discretion. Point of error 38 is overruled.

In points of error 40 through 42, appellant challenges prospective juror Duncan on three separate grounds. Appellant argues that Duncan could not consider his mitigating evidence, that he was unable to disregard illegally obtained evidence, and that he would find any confession admitted in evidence to be voluntary.

In the first of the three challenges, appellant states that Duncan was unable to consider evidence of his mental condition. We disagree. Duncan never stated that he would not *consider* evidence of appellant's mental condition. He merely stated his opinion that he probably would not find the evidence to be mitigating unless it

showed appellant could not distinguish between right and wrong. This Court has stated before:

> In Texas, this mitigating evidence is admissible at the punishment phase of a capital murder trial. Once admitted, the jury may then give it weight, if in their individual minds it is appropriate, when answering the questions which determine sentence. However, "[t]he amount of weight that the factfinder might give any particular piece of mitigating evidence is left to 'the range of judgment and discretion' exercised by each juror."

Johnson, 773 S.W.2d 322, 331 (Tex.Crim.App. 1989), *affirmed in part, Johnson v. Texas*, 113 S.Ct. 2658 (1993) (citations omitted).[15] The trial court did not err. Point of error 40 is overruled.

In his second challenge to the veniremember, appellant maintains that Duncan would not be able to disregard illegally obtained evidence, even if instructed to do so by the trial court. Duncan never unequivocally stated that he would not disregard the evidence; he stated that he "would give it a good shot, but [he] couldn't guarantee that [he] could completely blot it from memory." But later he stated that he would be able to follow the trial

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[15] Appellant cites *Morgan v. Illinois*, 112 S.Ct. 2222, 2234-35 (1992), in support of his argument. However, *Morgan* is not controlling. The Supreme Court held there that "[a]ny juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instruction to consider the mitigating evidence and to decide if it is *sufficient* to preclude imposition of the death penalty." That is not the situation here.

court's instructions. The trial court did not abuse its discretion in overruling appellant's challenge for cause. Point of error 41 is overruled.

His third challenge to Duncan alleges that the juror would consider any confession voluntary merely because the trial court admitted it into evidence over objection. Duncan stated first that he would give some weight to the court's ruling to admit a confession. However, he further stated that he would consider the mental capacity of the person confessing, whether the person understood the language being used, and the person's life history. Duncan never clearly stated that he *could not* disregard such a confession. According deference to the trial court's ruling and upon the record before us, we hold the trial court did not abuse its discretion in overruling appellant's challenge. *See White*, 779 S.W.2d at 820. Point of error 42 is overruled.

Points of error 43 and 48 contend prospective jurors Mangham and Burt would automatically answer special issue three on provocation in the affirmative. During the voir dire examination, the following was elicited from veniremember Mangham:

> Q. [C]an you consider that a killing could be reasonable, yet not be a self-defense issue?
>
> A. No.
>
> Q. Looking at Special Issue No. Three, then, can you think of any sort of factual situation, and, of course, you have to realize that there is now somebody dead, a murder has occurred, because you would have already found somebody guilty, and now you are dealing with this

> on punishment. It reads, "If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."
>
> Do you think that there is any sort of factual situation at all that you can conceive of, where the killing would not have been – where the killing would have been reasonable by the defendant towards the deceased?
>
> A. No.
>
> Q. And is there anything I can – I can't give you any kind of hypothetical or anything, could I, that would change your mind regarding that particular point?
>
> A. Maybe.
>
> Q. Okay Let's find out. What this is asking you to do is think of, in the process of the murder occurring, is that something that the decedent did which will not rise to the level of self-defense, could have provoked the defendant into committing the murder.
>
> A. Okay.
>
> Q. All right? I don't know if that helps you any, but now, is there anything that you could think of, any factual situation, and stop and think about it, where you could even consider answering that question anything but a simple no answer?
>
> A. Well, looking at it that way, I imagine there is.
>
> Q. You can conceive of a factual situation of some sort?

A. Yes.

Q. Do you have one on your mind right now?

A. No.

Prospective Juror Burt:

Q. Lets go to Special Issue Number Three. I like to focus on that word unreasonable there. Obviously, Mr. Price gave you some examples on that. You already have somebody convicted of capital murder, and so, you would know at that time that it was not self-defense because if it was self-defense, never have a conviction for anything?

A. Right.

Q. Self-defense is not murder. Okay. Can you think of a situation where a killing not in self-defense is truly reasonable?

A. No, I can't.

A veniremember is not challengeable for cause merely because he cannot think of a specific fact situation. *See Hogue v. State*, 711 S.W.2d 9, 27 (Tex.Crim.App. 1986). Mangham stated that he *could* conceive of a fact situation where he would answer special issue three in the negative. *See Harris v. State*, 784 S.W.2d 5, 24 (Tex.Crim.App. 1989). Burt was not questioned further on the issue. Article 35.16(c)(2) provides that a juror is challengeable for cause if "he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely." Neither Mangham nor Burt showed such prejudice. The trial court did not abuse its discretion by overruling appellant's challenges for cause. Points of error 43 and 48 are overruled.

In points of error 44 and 49, appellant claims that the trial court erred in overruling appellant's challenges to prospective jurors Baker and Burt. Specifically, appellant argues that the veniremembers could not consider child abuse in mitigation of punishment and, therefore, were biased against the law upon which he was entitled to rely.

During voir dire, Baker and Burt each stated that they would not consider child abuse to be a mitigating factor. However, each did say that they would follow the court's instructions. Further, Baker later stated that his consideration of child abuse would depend on the "whole history" of the abuse; and Burt stated that she would consider it as "part of the overall picture."

Baker and Burt were not shown to have bias or prejudice against the law. The mere fact that they acknowledged that they believed such evidence deserves little or no weight does not create a sustainable challenge for cause under Article 35.16. *Johnson*, 773 S.W.2d at 331; *Allridge*, 850 S.W.2d 471, 482 (Tex.Crim.App. 1991). Appellant's 44th and 49th points of error are overruled.

In points of error 50 and 51, appellant claims the trial court erred in overruling his challenge for cause to prospective juror Blake. At the conclusion of his voir dire of Blake, appellant stated:

> We will challenge this juror for cause. He violated the Court's order by discussing this case that worked [sic] after he was instructed not to do so, and if he can't follow those instructions, he can't be expected to follow the court's charge. He also indicated that he would have to take the victim impact into account. Further, he indicated that he is less likely to believe Johnny

> than a peace officer. He has already made up his mind about that. That is our challenge for cause on this juror.

In his brief, appellant complains that Blake was biased against him, that Blake would not presume appellant to be innocent, and that Blake would not hold the State to its burden of proof. Because the basis for the challenge during voir dire differed from these complaints made on appeal, appellant has waived any error as to these complaints. *Harris*, 784 S.W.2d at 27.

Appellant also argues under these points that Blake did not follow the trial court's instructions and discussed the case with other people. He argues that this created harm because some of these "people" expressed opinions about the case and made Blake biased against appellant. We have stated before that "[p]rior knowledge of a crime from the news media and community discussion is not sufficient grounds to require that a venireman be excused for cause. The sole question for determination is whether a juror can put aside prior knowledge and opinion and render an impartial verdict." *Kemp v. State*, 846 S.W.2d 289, 298 (Tex.Crim.App. 1992) (citations omitted). After a review of the voir dire, we hold that the record supports the trial court's implicit finding that Blake was capable of discarding any preconceived conclusions he may have had and would follow the law as given to him by the court. *Id.* at 299. The trial court did not abuse his discretion. Points of error 50 and 51 are overruled.

2. Improper Ouestions

In points of error 54 through 59, appellant contends that the trial court erred by refusing to allow him to ask six prospective jurors proper questions during voir dire, thereby preventing the intelligent use of his peremptory strikes.

In *Nunfio v. State*, 808 S.W.2d 482, 484 (Tex.Crim.App. 1991), we held:

> The standard of review in a case where the defendant claims he was improperly restricted on voir dire is whether the trial court abused its discretion. The propriety of the question which the defendant sought to ask is determinative of the issue. We have held that a question is proper if it seeks to discover a juror's views on an issue applicable to the case.

See also Woolridge v. State, 827 S.W.2d 900, 904 (Tex.Crim.App. 1992). However, the trial court does have the authority to impose reasonable restrictions on the exercise of voir dire examination. *Guerra v. State*, 771 S.W.2d 453, 467 (Tex.Crim.App. 1988). The denial of a proper question during voir dire is always reversible error and will not be subject to a harm analysis under rule 81(b)(2) of the Texas Rules of Appellate Procedure. *Nunfio*, 808 S.W.2d at 485.

In point of error 54, appellant complains that the trial court prevented him from inquiring whether venireperson Lawson could distinguish between the terms "intentional" and "deliberate." After questioning by both appellant and the State on the terms relating to special

issue number one, the following occurred during appellant's re-examination of Lawson:

> Q. Because you have already found that person had already intentionally committed a crime, does that mean that you can answer number one automatically yes, because you have already found that he intentionally committed a crime?
>
> A. No, sir.
>
> Q. I'm sorry?
>
> A. No, sir.
>
> Q. Okay. So, in your mind, there now is a distinction between deliberate and intentional?
>
> [By the Prosecutor]: Objection, Your Honor. That is an improper question. Just because he said he would answer that question based on the evidence, doesn't mean that there is a distinction at all.
>
> The Court: Sustain the objection.

Although the State's objection was improper, the question had already been asked and answered when Lawson replied that he would not automatically answer yes to special issue one if appellant were found guilty of intentionally committing the crime. It is within the discretion of the trial court to refuse questions that are duplicitous or unnecessary. *Guerra*, 771 S.W.2d at 467. The trial court did not abuse its discretion. Point of error 54 is overruled.

Appellant argues in point of error 55 that he was not allowed to determine prospective juror Duncan's attitude towards the mentally retarded. The trial court did not

permit appellant to ask Duncan whether persons who are mentally retarded should be allowed to serve on juries. Appellant had previously been allowed to ask Duncan the following questions:

> Q. Do you think that mental retardation might have an effect on the voluntariness of a person's statement given to a peace officer?
>
> * * *
>
> Q. Can you fairly weigh and consider the testimony of that person's mental retardation, on the effect of the mental retardation on the communication skills of those who are so afflicted?
>
> * * *
>
> Q. Do you feel that a person's mental state can be so affected by mental retardation or mental illness that he cannot actually appreciate the gravity of his act, does it seem fair to you that you would consider this evidence in making your decision in determining whether or not the person did anything, has a conscious objective or desire as required by law, or even be the awareness of a reasonable certainty that a death would result?
>
> * * *
>
> Q. Do you think a mental illness can be as debilitating as a physical ailment?
>
> Q. Do you have an opinion as to whether or not mental [sic] retarded persons should be permitted to vote?

Appellant asked various questions pertaining to Duncan's attitude towards mentally retarded persons. As stated before, a trial court does not abuse its discretion by

restricting duplicitous questioning. *Guerra*, 771 S.W.2d at 467. In any case, the prohibited question did not relate to an issue in the case and was, therefore, improper. *Nunfio*, 808 S.W.2d at 484; *Woolridge*, 827 S.W.2d at 904. Point of error 55 is overruled.

In point of error 56, appellant maintains that the trial court prevented him from inquiring whether venireperson McClure would be unduly affected by evidence of any impact the murder had on the victim's family. Appellant asked McClure the following:

> Q. Well, do you feel it is important to consider, in determining whether the sentence should be life or death, any impact, if there was, on the victim's family?

A. Well, I kind of answered that already. When it gets to the same thing, it was something in my family, you know, I think if someone in my family – I have already answered how I feel about it, and any time there is any kind of brutal death, I think that it has a great impact on that family, the immediate family and outside family, too, friends, but I don't know if that would make my opinion looking at this family, I guess it could probably come into my opinion a little, because like I said, I could.

I wouldn't want to put myself in this family's shoes, but I think I could also relate to what they are going through.

Q. Well, do you suppose that any facts that might somehow or another get before you in a trial of a capital murder case, about the victim's family, can you assure us that those facts would not prevent you or substantially impair you

from imposing a life sentence as opposed to a death sentence?

PROSECUTOR: Objection, Your Honor, trying to commit the juror.

THE COURT: Sustain the objection.

Q. It may seem to some that I am trying to commit you, but I am not, really. I am trying to state this fair. Let us assume that you are considering in the penalty phase of any capital murder case, okay? And some of the evidence that has come in shows that the victim's family was greatly impacted and terribly grieved and greatly harmed by the facts.

A. Uh huh.

Q. Okay? Can you assure us that the knowledge of those facts would not prevent you or substantially impair you in considering a life sentence in such a case?

PROSECUTOR: Objection again, he is trying to bind the juror.

THE COURT: Restate just the last part, Mr. Wright. The objection is sustained.

DEFENSE COUNSEL: The question is, Judge –

THE COURT: I understand the question. Restate it.

* * *

PROSECUTOR: I would like to also interject, object to being repetitious. The witness has already answered the question.

We agree that the question had already been asked and answered. *See Guerra, supra.* Furthermore, the question at issue attempted to commit McClure to what his view would be under a particular fact situation. While it is proper to pose hypothetical fact situations to explain the application of the law, it is improper to inquire how a veniremember would respond to particular circumstances. *Cuevas v. State,* 742 S.W.2d 331, 336 n.6 (Tex.Crim.App. 1987). The trial court did not restrict appellant's questioning on the subject matter but rather restricted the form appellant used to ask his question. We conclude the trial court did not abuse its discretion. *See Allridge v. State,* 762 S.W.2d 146, 163-64 (Tex.Crim.App. 1988). Point of error 56 is overruled.

In appellant's 57th point of error, he contends the trial court improperly restricted him from questioning prospective juror Mangham about her potential bias against defense character witnesses:

> Q. Would you give little or no credence to the defendant's character witnesses, if they came to testify as to mitigation of circumstances, just because they were related to the defendant?
>
> PROSECUTOR: Trying to pin the juror as to what she would do in a particular type of evidence.
>
> THE COURT: Sustain the objection. You can restate the question, Mr. Smith.
>
> DEFENSE COUNSEL: Your Honor, I believe that that is a permissible statement under –
>
> THE COURT: Objection sustained. Excuse me.

* * *

> Q. Could you consider a lay witness' testimony about the defendant's mental condition, and that means like a next door neighbor or something like that?
>
> A. No.
>
> Q. Mother or father?
>
> A. Yes.

Appellant's question constituted an attempt to require Mangham to commit herself as to how she would pass upon the credibility of character witnesses prior to trial. *See Guerra,* 771 S.W.2d at 468-69 (police witnesses). The trial court was not limiting appellant's questions in this area but merely restricted the form. As can be seen, when appellant reworded the question to elicit whether Mangham could consider testimony from his relatives, it was not found objectionable. Appellant's 57th point of error is over-ruled.[16]

In point of error 58, appellant complains that he was not allowed to ask whether veniremember Roberts could follow an instruction placing the burden of proof on the State to *disprove* appellant's evidence of mental retardation and child abuse. The State objected to the questions on the ground that they were a misstatement of the law. The trial court sustained the objections and explained

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[16] Appellant relies on *Esterline v. State,* 707 S.W. 2d 171, 174-75 (Tex. App. – Corpus Christi 1986, pet. ref'd), for the proposition that the question at issue here was proper. We disagree. In *Esterline,* the veniremember's answer was challengeable, not the question posited. In fact, *Esterline* does not provide the reader with the question that was asked.

that the law only requires the State to prove each of the special issues beyond a reasonable doubt.

To support appellant's claim that he needed to be able to question Roberts on his ability to follow the proffered instruction on the burden of proof, "it must at least be plausible that the jurors might actually have to follow that instruction." *Spence v. State*, 795 S.W.2d 743, 755 (Tex.Crim.App. 1990). Because appellant's instruction was a misstatement of the law (*see* points of error 83-86, *infra*), we hold the trial court did not abuse its discretion. We also note that appellant was able to ask the following question and get an answer:

> Alright, [w]ell, you feel like it would be fair to require the State to remove any doubt about mental retardation or child abuse beyond a reasonable doubt?

No error is shown. Point of error 58 is overruled.

MISSTATEMENTS OF LAW TO PROSPECTIVE JURORS DURING VOIR DIRE

In point of error 60, appellant argues that the trial court erred in allowing the State to misstate the law to various prospective jurors. Specifically, he complains that the State improperly equated mitigating factors with factors that reduce appellant's *blame* for the crime.

Appellant's complaint is without merit. A review of the voir dire examination reveals that, although the State defined "mitigating" in limited terms, defense counsel had the opportunity to cross-examine each veniremember regarding the meaning of mitigating. Further, the trial court instructed each juror prior to his individual voir

dire that anything the attorneys said could not be considered as evidence, and also defined the term "mitigating" in the court's charge.[17] Any error in the State's earlier definition was, therefore, harmless. *See Adanandus v. State*, 866 S.W.2d 210, 225 (Tex.Crim.App. 1993). Point of error 60 is overruled.

Point of error 61 avers that the trial court erred in allowing the State to incorrectly tell prospective jurors that "deliberate" is not necessarily distinct from "intentional."

Appellant made no objection to the State's definition during voir dire.[18] Therefore, he has preserved nothing for our review. Tex. R. App. Proc. 52(a); *Draughon v. State*,

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[17] The trial court charged:

> A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue.

[18] Appellant did file an objection regarding this point of error in a written motion to change venue. This written motion was not filed until fifteen days after the last complained-of juror was questioned. We further note that appellant's point of error is completely unfounded. In each complained-of incident, the State merely stated that sometimes "intentional" and "deliberate" may seem to be the same, but that under the law there is a distinction.

831 S.W. 2d 331, 336-37 (Tex.Crim.App. 1992). Point of error 61 is overruled.

In appellant's 62nd point of error, he complains that the State used an improper hypothetical example of an intentional killing during its general voir dire and the individual voir dire of several veniremembers. Appellant points to only one veniremember, Guidry, apparently the last one with whom the State used the complained-of hypothetical. Appellant concedes that he failed to object during the general voir dire and the previous individual voir dire. Therefore, appellant has preserved error for our review only with regard to veniremember Guidry. *See* Tex. R. App. Proc. 52(a); *Johnson*, 803 S.W.2d at 291.

The State posed the following hypothetical to veniremember Guidry:

> When I get to give you an example, say you got a murder in the course of an armed robbery, and it occurs as follows: You've got an individual. He goes into a convenience store to rob it, and he has got a gun. He walks up to the counter, cocks the gun, and just sticks it right in the clerk's face, and says, you know, give me the money, this is a stick-up. About that time, let's say that he heard a noise out the front door, that he may have thought was a customer driving up or whatever, and he looked out the front door, holding the gun cocked on the clerk at the same time, and he is looking out the front door, and he sees a movement out of the corner of his eye. He never even turns his head back around, just pulls the trigger, boom, instinctively. The clerk maybe was just reaching for the money, like he had told him to, but all of this happened real

> quick, looks out the front door, sees a movement, pulls the trigger. Okay? He intended to fire the gun, so a jury might find him guilty of capital murder because he intentionally shot the clerk. He intended to do that because at the moment he fired, he had the conscious desire to fire that gun, it was not an accident. You see what I'm talking about? But it didn't require hardly any thought at all, almost a reflex response.

Appellant objected that this was an improper hypothetical, but the trial court overruled the objection. Appellant cites *Morrow v. State*, 753 S.W.2d 372 (Tex.Crim.App. 1988), in support of his position.

In *Morrow*, the State posed a hypothetical question which was intended to demonstrate the difference between a murder that is committed intentionally and one that is done deliberately. However, the hypothetical, as represented by the State, could not constitute capital murder under Texas Penal Code § 19.03(a)(2):[19] a man robs a convenience store and intentionally shoots a person in the knee; the person later dies of medical complications or bleeds to death. *Morrow*, 753 S.W.2d at 373-375.

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[19] Article 19.03(a)(2) of the Texas Penal Code reads:

> (a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:
>
> * * *
>
> (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault or arson.

The example failed to suggest that the accused had any intent to murder his victim. We held such a representation could only give a veniremember the impression that any intentional act indirectly causing the death of a victim during a robbery will raise the crime to capital murder. *Id.* at 375; *see also Lane v. State*, 743 S.W.2d 617, 619-29 (Tex.Crim.App. 1987) (robber intentionally fires shot into the ceiling and it ricochets, killing someone); *Gardner v. State*, 730 S.W.2d 675, 686-87 (Tex.Crim.App. 1987) (robber intentionally shoots man in the leg, and man later dies).

Unlike the hypothetical in *Morrow*, the hypothetical posed here is a proper example of both murder, Texas Penal Code § 19.02 (a)(1), and capital murder, Texas Penal Code § 19.03(a)(2). It can be inferred that an accused who, during the course of a robbery, intentionally shoots his victim in the face, had the conscious objective or desire that death should result. *See* Tex. Penal Code § 6.03(a) (definition of "intentional"). The death did not indirectly occur. We find no error in the State's hypothetical. Point of error 62 is overruled.

In point of error 63, appellant complains that the State erroneously stated that a prospective juror could decide not to consider mental retardation as a mitigating circumstance. The State asked veniremember Gillaspie the following question:

> If mental retardation were presented to you, as a mitigating factor, and I am not going to even ask whether or not you consider that a mitigating factor because I would think that first of all, it would be important to know what type of crime was involved to start with, but, secondly, would you feel like it would be important to know the degree or to have evidence on the extent of the retardation?

Appellant failed to object to this question. Therefore, he has failed to preserve any error for our review.[20] Tex. R. App. Proc. 52(a); *Johnson*, 803 S.W.2d at 291. Point of error 63 is overruled.[21]

Appellant's 64th point of error avers that the trial court used a flawed proposed mitigation instruction during voir dire that was not used at punishment, and, therefore, appellant was unable to conduct his jury selection properly.

The sample instruction given by the trial judge to the prospective jurors stated the following:

> If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to that special issue under consideration.

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[20] Appellant miscites the record on appeal. The objection he claims preserved the alleged error was, in reality, an objection to a different question regarding child abuse.

[21] Appellant cites *Trevino v. State*, 815 S.W.2d 592, 614 (Tex.Crim.App. 1991), for the proposition that youth is a mitigating factor that must be considered as a matter of law. This Court has subsequently held that the law does not require a juror to consider youth as a mitigating factor; a juror may consider youth to be *either* mitigating or aggravating. *Robertson v. State*, 871 S.W.2d 701, 712 n.13 (Tex.Crim.App. 1993).

The instruction given at punishment stated:

> If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

There was no significant difference between the two instructions. Because we have held that the instruction given at punishment was proper (points of error one through eleven, *infra*), we hold the sample instruction used during voir dire was also proper.

As to appellant's contention that the differing instructions somehow harmed him during jury selection, no objection was ever made. Therefore, appellant has waived any error. *See* Tex. R. App. Proc. 52(a); *Johnson*, 803 S.W.2d at 291. Point of error 64 is overruled.

SEARCH

In appellant's 71st point of error, he complains that the trial court incorrectly granted the State's motion for neurological testing. He further argues that the admission of information obtained from the testing violated his rights under the Fourth Amendment to the U.S. Constitution and Article I, section 9 of the Texas Constitution. Appellant, in both phases of the trial, raises the issue of his mental status through evidence regarding mental retardation, organic brain damage, and his I.Q. The State in countering this assertion argues that the evidence was

necessary to combat appellant's claimed brain dysfunction and requested a search warrant in order to gain the following information:

> (1) The determination and diagnosis of this defendant's mental condition at all times relevant to these proceedings; (2) To determine the existence and/or extent of any brain dysfunction and its effects upon the defendant's mental status, and intent; (3) To determine the defendant's true neurological condition as, it may bear upon the issues of voluntariness, ability to comprehend legal issues, ability to voluntarily reform conduct to the requirements of the law, the intent required to commit the offense charged and as same may have a bearing upon any mitigating or aggravating evidence as well as the likelihood of the defendant to commit future acts of violence and constitute a continuing threat to society.

Article 18.02 sets out the grounds for issuance of a search warrant. Appellant argues that the only feasible ground of issuance in the instant case can be found in Article 18.02(10): "property or items, except personal writings by the accused . . . constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense." He asserts that neurological testing does not fit within the article.

Neurological testing is a *tool* used to determine a person's mental status and is equated with testing of a psychiatric or psychological nature. Further, mental status is relevant to a person's competency to stand trial and his personal culpability. Therefore, the trial court properly ordered the tests under *Estelle v. Smith*, 452 U.S. 454,

465 (1981).[22] Appellant's rights under the Fourth Amendment and Article I, section 9 were not violated.

Because the trial court properly ordered the tests under *Estelle v. Smith*, we need not consider whether article 18.02 is applicable.[23] Point of error 71 is overruled.

CONFESSIONS

In points of error 66 through 70, appellant argues that the trial court erred in finding his confessions voluntary at the pre-trial suppression hearing and then admitting them during both phases of the trial. He maintains that given his mental impairment, he did not understand the warnings given to him and that he did not make a knowing, voluntary, and intelligent waiver under *Miranda* and

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[22] "When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. . . . (A) defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist." *Estelle v. Smith, supra.* Because neurological testing is a tool to determine a person's mental status, it falls within the realm of a sanity examination and is properly ordered by the court. *See also Buchanan v. Kentucky*, 483 U.S. 402, 422-25 (1987) (extreme-emotional-distress defense).

[23] It is well established that "[i]f the decision is correct on any theory of law applicable to the case it will not be disturbed." *Calloway v. State*, 743 S.W.2d 645, 652 (Tex.Crim.App. 1988); *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990).

Article 38.22.[24] He asserts finally that his Fifth Amendment rights were violated because the officers did not effectively communicate the statutory warnings to him.

At a suppression hearing, the trial court is the sole judge of the credibility of witnesses and the weight of their testimony. *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990). Therefore, if the record supports the trial court's findings, we will not disturb those findings. We only consider whether the trial court applied the law to the facts properly. *Id.*

Article 38.21 provides that a statement of an accused may be used in evidence against him if it appears that it was freely and voluntarily made without compulsion or persuasion. The determination of whether a confession is voluntary is based on an examination of the totality of

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[24] Appellant was given his warnings consistent with Article 38.22. The Article 38.22 warnings state:

> (1) [The accused] has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
>
> (2) any statement he makes may be used as evidence against him in court;
>
> (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
>
> (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning;
>
> (5) he has the right to terminate the interview at any time.

The Texas statutory warnings are in compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966).

circumstances surrounding its acquisition. *Griffin v. State*, 765 S.W.2d 422, 429 (Tex.Crim.App. 1989).

Mental deficiency is a factor, but not alone determinative, in ascertaining the voluntariness of a confession and the waiver of the Fifth Amendment privilege against self-incrimination. *Smith v. State*, 779 S.W.2d 417, 429 n. 8 (Tex.Crim.App. 1989); *see also Casias v. State*, 452 S.W.2d 483, 488 (Tex.Crim.App. 1970). In analogous cases of mentally-slow or retarded defendants, this Court has found confessions to be voluntary. *See Casias*, 452 S.W.2d at 488 (confession admissible even though defendant had I.Q. of 68, was illiterate, and had mental age of eight to ten years); *White v. State*, 591 S.W.2d 851, 858 (Tex.Crim.App. 1979) (confession admissible even though defendant was borderline mentally retarded); *Grayson v. State*, 438 S.W.2d 553, 555 (Tex.Crim.App. 1969) (statements admissible from a defendant with an I.Q. of 51 and mental age of six years).

The following evidence was elicited regarding the two written confessions: Officer Billy Ray Nelson, present at appellant's arrest,[25] testified that he was familiar with appellant. He stated that he had had conversations with appellant and that appellant seemed to be of normal intelligence. Nelson was present when Officer Bob Grissom first read appellant his statutory rights at the scene of the arrest. He confirmed that Grissom read appellant

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[25] Prior to his arrest, appellant voluntarily accompanied the police to the victim's home. While there, without any prompting by the police, appellant orally confessed to the crime.

each of his rights and asked appellant whether he understood those rights. Appellant responded that he did.

Appellant was then brought before Judge Garnet Galloway, who advised appellant of the charge against him, again read him his rights, and set bond. Galloway verified that appellant understood his rights. Further, appellant's father was present and also read appellant his rights. His father then asked him whether "he did it." Appellant replied that he did.

Appellant next gave his statement to Chief William F. Smith.[26] Prior to taking his statement, Smith again read appellant his statutory rights and asked whether he understood each right. Smith then asked whether appellant wished to give a statement. Appellant replied that he did. The statement took approximately three hours. After he completed his statement, appellant told Smith that he could not read or write.

In order to confirm that appellant's statement was correct, Smith brought in two civilians off the street to witness the reading and signing of the statement. The entire statement, including another recitation of the statutory warnings, was read to appellant in the presence of the two witnesses. Appellant was then given the opportunity to make any changes to his statement before he signed it.

A second, more-detailed confession was taken the next day by Texas Ranger Maurice Cook. Cook read the statutory warnings to appellant, made sure that appellant

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[26] District Attorney Joe Price was also present. Price was also in attendance for the second confession.

understood the meaning of "lawyer," "urge," and "trial," and generally explained the warnings in basic terms. At one point, Cook even exaggerated a fact from the previous day's confession to see whether appellant would correct him. Appellant did. Appellant was questioned for about five hours during the second confession, but was given "hamburgers and cokes" during that time. Again, two people were brought in to witness the reading and signing of the statement. Statutory warnings were again given to appellant at this time.

Dr. Windall Dickerson, a psychologist for the defense, testified that he believed appellant did not voluntarily waive his rights because appellant could not comprehend the consequences of that waiver. In Dickerson's opinion, appellant is a severely limited, mentally retarded individual. He noted appellant's I.Q. scores ranged from the forties to the seventies and that appellant had very poor judgment. He testified that many retarded people attempt to answer what they think others want to hear in order to appear smarter. Further, he stated that without further explanation, appellant could not have understood the statutory warnings.

In addition to the evidence elicited at the hearing, the trial court took judicial notice of all evidence from the 1980 suppression hearing in which the confessions were found voluntary; the prior testimony of Dr. Felix Peebles; and the finding of competency from appellant's first trial. There was no evidence of governmental coercion.

Appellant argues that the State did not meet its burden of showing that the confessions were voluntary because no evidence was presented to rebut Dickerson's

testimony that the officers inadequately explained appellant's rights to him. Specifically, he maintains that the officers should have done extensive follow-up questioning and elicited explanations from him in his own words to ensure that his statements were voluntary. However, appellant presents no case law to suggest that the officers were obligated to follow these procedures, and we find that there was no such obligation under these circumstances.[27]

The record shows appellant was advised of his statutory rights, he understood them, and voluntarily waived them before making his statements. The confessions were written as appellant related his story, and they were read to him before he signed them. Appellant's evidence of mental retardation and illiteracy does not, standing alone, render his confessions inadmissable. *See Casias*, 452

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[27] Appellant cites *Farr v. State*, 519 S.W.2d 876, 880 (Tex.Crim.App. 1975), and *Sherman v. State*, 532 S.W.2d 634, 636 (Tex.Crim.App. 1976), in support of his argument. However, neither case is applicable. In both *Farr* and *Sherman*, the confessions were found inadmissible because the defendant had presented evidence that he was *coerced* into confessing by the interrogating officers. There is no evidence of official overreaching in this case. We further note that official coercion is relevant to a Fourteenth Amendment due process analysis. We are unsure whether appellant is making a separate Fourteenth Amendment argument. However, if he were, it would have to be rejected. Coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Further, a defendant's mental condition, by itself and apart from its relation to official coercion, will never require a conclusion of involuntariness. *Id.* at 164.

S.W.2d at 488; *White*, 591 S.W.2d at 858; *Grayson*, 438 S.W.2d at 555. The bulk of the evidence shows that appellant had the basic reasoning skills necessary to understand the warnings. We hold that the trial court did not err by overruling appellant's motion to suppress and admitting his confessions into evidence. Points of error 66 through 70 are overruled.

In points of error 89 through 102, appellant complains that the trial court improperly instructed the jury regarding the voluntariness of the confessions. Because appellant offered evidence that he was mentally retarded, he claims he raised an issue of fact as to whether the confessions were voluntary. Therefore, he asserts, the trial court was required to instruct the jury on the issue of voluntariness. *See* Article 38.22, §§ 6 & 7; *Rogers v. State*, 549 S.W.2d 726, 729 (Tex.Crim.App. 1977). An instruction on the voluntariness of appellant's confession was given in the jury charge at guilt/innocence.[28]

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[28] The instruction stated:

> You are instructed that under our law a confession of a defendant . . . shall be admissible in evidence if it appears that the same was freely and voluntarily made, without compulsion or persuasion, provided, however, that it be made in writing and signed by the accused, and show that the accused has been warned prior to making such statement or confession, by the person to whom the same is made that: [Statutory warnings]
>
> So in this case, if you find from the evidence, or if you have a reasonable doubt thereof, that prior to the time the defendant gave the alleged statement or confession to Chief of Police Bill Smith, if he did give it, the said Chief of Police Bill Smith did not warn the defendant in the respects just out-lined, or as to any one of such requirements just outlined, then you will wholly disregard the alleged statement or confession and not consider it for any purpose nor any evidence obtained as a result thereof. If, however, you find beyond a reasonable doubt that the aforementioned warning was given the defendant prior to his having made such statement, if he did make it, still, before you may consider such statement as evidence in this case, you must find from the evidence beyond a reasonable doubt that prior to and during such statement, if any, the defendant knowingly, intelligently and voluntarily waived the rights hereinabove set out in the said warning, and unless you so find, or if you have a reasonable doubt thereof, you will not consider the statement or confession for any purpose whatsoever or any evidence obtained as a result of same.

An identical paragraph applicable to the confession made to Texas Ranger Maurice Cook followed.

Points of error 90, 92, 93, 98, 101 and 102 each pertain to the trial court's failure to instruct the jury at the punishment phase on the voluntariness of appellant's confession. In appellant's prior case, this Court held that, although a defendant does have the statutory right to have the issue of voluntariness submitted to the jury, he is not entitled to have it *resubmitted* at the penalty phase when such issues have already been submitted at guilt/innocence. *Penry v. State*, 691 S.W.2d 636, 652 (Tex.Crim.App. 1985), *rev'd on other grounds, Penry v. Lynaugh, supra.*

Under the doctrine of the law of the case, where determinations as to questions of law have already been made on prior appeal to a court of last resort, those

determinations will generally be held to govern the case throughout all of its subsequent stages. *Ex parte Granger*, 850 S.W.2d 513, 516 (Tex.Crim.App. 1993). This issue having been previously decided adversely to appellant, his points of error are overruled.

In point of error 89, appellant complains that the trial court erred in failing to instruct the jury on the meaning of the word "intelligently." He objected to the court's charge because it failed to define "intelligently" so as to require "an appreciation of the significance of the relinquishment of those [statutory] rights in a mature and meaningful way." He argues that the jury charge did not require any substantial mental capacity for a waiver of his rights, and thus harmed him by allowing the jury to determine that he had made a valid waiver when he did not have the necessary intelligence.

The Supreme Court has said that waivers must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a known right or privilege, taking into account the background, experience, and conduct of the accused. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). In Texas, waiver of the rights defined in the warnings set out in Article 38.22[29] must be made "knowingly, intelligently, and voluntarily." Article 38.22. Neither the Supreme Court nor the statute requires any definition of the terms found therein.

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[29] The Article 38.22 warnings encompass the Miranda warnings and one additional warning. *See* n. 19, *supra*.

"Where terms used are words simple in themselves and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms, and under such circumstances such common words are not necessarily to be defined in the charge to the jury." *Russell*, 665 S.W.2d at 780. In this context "intelligently" is used in its ordinary sense. Jurors are expected to decide whether appellant had an intelligent understanding of his statutory rights, given the available evidence. Appellant erroneously concludes that he must also be found to have had an intelligent understanding of the repercussions of waiving his rights. While a defendant must be instructed that his statements can be used against him in court, the Supreme Court has stated that he need not realize all the possible consequences of the waiver for it to be found to be knowing and intelligent. *Colorado v. Spring*, 479 U.S. 564, 574-75 (1987); *Moran v. Burbine*, 475 U.S. 412, 422-23 (1986). The jury was entitled to give the term its common and ordinary meaning. Point of error 89 is overruled.

In point of error 91, appellant argues that the trial court erred in failing to instruct the jury that the statutory warnings must have been "effectively communicated" to appellant. He also complains of the trial court's failure to define the word 'warn' as used in the charge. Appellant's "Objection No. 8" stated:

> The Defendant objects to the charge of the Court concerning the giving of warnings in connection with the custodial interrogation of an accused in that it fails to instruct the jury that the officer taking the statement must effectively communicate each of the warnings to the accused in order to obtain a lawful custodial confession,

and that the statement must be disregarded for failure to do so.

We note initially that appellant's objection below did not complain about the trial court's failure to define "warn" in the charge. Therefore, that particular issue is not preserved for our review. Tex. R. App. Proc. 52(a); *Barnes*, 876 S.W.2d at 325; *Johnson*, 803 S.W.2d at 293.

With respect to appellant's other argument, he contends that the officers should have taken more care in giving the warnings to him because he was obviously mentally deficient. Therefore, given his mental handicap, he argues, the jury should have been instructed that the warnings must have been "effectively communicated" to him.

The trial court instructed the jury not to consider appellant's statements for any purpose unless they found he had been given the proper warnings, and had "knowingly, intelligently, and voluntarily" waived his statutory rights. This instruction was a correct statement of the law on the admissibility of appellant's confession. *Bell v. State*, 582 S.W.2d 800, 812 (Tex.Crim.App. 1979). The trial court did not err in overruling appellant's objection because the court had already fully instructed the jury on the applicable law. *Id*. Point of error 91 is overruled.

In point of error 94, appellant argues that the trial court erred in refusing to instruct the jury that his confession should not be considered if they believed, or had a reasonable doubt, that appellant was so mentally deficient as to be incapable of under standing the nature and effect of his confession. Appellant claims the requested instruction asked the jury to take his mental retardation

into account in regard to the voluntariness of his confession, and that the trial court had an obligation to instruct the jury on this relevant legal issue.

Article 36.14 states that a jury charge should set forth the applicable law of the case without expressing an opinion on the weight of the evidence, summing up the testimony, or discussing the facts or using jury argument to arouse the sympathy or excite the passions of the jury. When the trial court properly instructs the jury on the issue of voluntariness, a special instruction singling out the issue of mental retardation would be an improper comment on the weight of the evidence. *Bell*, 582 S.W.2d at 812.

Here, the trial court properly submitted the voluntariness issue to the jury, requiring that before considering the confession, the jury had to find beyond a reasonable doubt that all the proper warnings were given prior to appellant's statement, that the statement was freely and voluntarily made, and that appellant knowingly, intelligently, and voluntarily waived his rights before and during the making of the statement. Therefore, it would have been an improper comment on the evidence for the court to include the issue of mental retardation in the charge. Appellant's argument concerning his mental retardation should have been (and was) argued to the jury during closing arguments. Appellant's point of error is overruled.[30]

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[30] Appellant also argues that he was entitled to this instruction because a defendant is entitled to an affirmative submission on every defensive theory raised by the evidence. *See Hill v. State*, 585 S.W.2d 713, 714 (Tex.Crim.App. 1979).

In point of error 95, appellant argues that the trial court erred in refusing to instruct the jury not to consider his confessions if they believed appellant was induced to confess by the promise made by Ted Everett, an investigator for the District Attorney's office. Everett promised appellant he would not "put anything on [him] that [he] did not do." Appellant argues that, given his mental status, this promise by Everett could have misled him to believe he could "say nearly anything" to the interrogating officers and Everett would "correct things for him later."

If a promise made by a person in authority induced a confession, then that confession is inadmissible. *Alvarez v. State*, 649 S.W.2d 613, 620 (Tex.Crim.App. 1982). Generally, the determination of the voluntariness of the confession depends on the totality of the circumstances surrounding the confession. *Id.* However, before a promise will render a confession inadmissible, the promise must be shown to have induced the confession because it was positive for the defendant, made or sanctioned by someone in authority, and of such an influential nature that appellant might speak untruthfully in response. *Muniz v. State*, 851 S.W.2d 238, 254 (Tex.Crim.App. 1993). In our review, we look to whether the circumstances of the promise would reasonably induce a defendant to

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However, *Hill* is inapplicable to the instant case. The refusal of a defendant's requested instruction is not error where the requested instruction is merely an affirmative submission of a defensive issue which denies the existence of an essential element of the State's case. *Green v. State*, 566 S.W.2d 578, 584 (Tex.Crim.App. 1978).

admit to a crime he did not commit. *Sossamon v. State*, 816 S.W.2d 340, 345 (Tex.Crim.App.1991).

Everett described the conversation with appellant as follows:

> I asked him if he would go with us back downtown, to which he replied, yes, I will, if you will promise me one thing, and I said, well, what is that, Johnny, and he said if you will promise me that you won't try to hang anything on me that I didn't do, and I said, well, Johnny, you know me better than that, I am not going to do that, and he said okay, I will do it.

Here, Everett merely promised not to charge appellant with a crime he did not commit. There is no reason to believe that, in response to this promise, even a mentally retarded person would have expected Everett to protect him from prosecution for a crime he freely admitted. Furthermore, the promise was made in response to Everett's request that appellant accompany him downtown. No connection was expressed or implied to the later questioning by Chief Smith and Ranger Cook or any other potential confession by appellant. It does not follow that this promise could have reasonably induced appellant to confess to a crime he did not commit.

The totality of the circumstances does not indicate that this promise in any way eroded the voluntariness of appellant's statements. Therefore, appellant was not entitled to his requested instruction. *See Hernandez v. State*, 819 S.W.2d 806, 812 (Tex. Crim.App. 1991). Point of error 95 is overruled.

In points of error 96 and 97, appellant argues that the trial court should have instructed the jury that an independent voluntariness determination must be made separate from the determination that warnings were given and *Miranda* rights were waived. He says the jury charge did not clearly explain that the confession must be found voluntary whether or not *Miranda* warnings were given. We disagree.

The instructions given to the jury for each confession clearly set forth two conditions which must be met before the jury may consider those confessions as evidence. *See* footnote 24, *supra*. The first condition concerned the giving of the Article 38.22 statutory warnings. If that condition was met, the jury was instructed that "before you may consider such statement as evidence in this case, you must find from the evidence beyond a reasonable doubt that prior to and during such statement, if any, the defendant knowingly, intelligently and voluntarily waived the rights. . . . "

Appellant further complains that the term "appears" in the first paragraph of the instruction makes the charge ambiguous. The instruction states: "You are instructed that under our law a confession of a defendant . . . shall be admissible in evidence if it *appears* that the same was freely and voluntarily made . . . " This language complies with Article 38.21. Appellant views the charge piecemeal, whereas this Court views it as a whole. The charge was not ambiguous and clearly delineates between the *Miranda* and voluntariness requirements. *See Bell*, 582 S.W.2d at 812; *Burdine v. State*, 719 S.W.2d 309, 320

(Tex.Crim.App. 1986). Points of error 96 and 97 are overruled.[31]

In points of error 99 and 100, appellant argues the trial court erred in failing to instruct the jury not to consider the truth or falsity of appellant's confessions in deciding whether they were voluntary and admissible. Appellant further argues that the State, in its argument to the jury, emphasized the reliability of the confessions with the implication that it counteracted appellant's evidence that his confessions were not voluntary. Appellant contends that his mental retardation makes this error particularly egregious because the jury was discouraged from fully evaluating the impact of appellant's mental impairment on the voluntariness of his confession.

Appellant made no objection on these grounds to the State's argument at trial; therefore, he did not preserve the issue of the alleged jury argument error. Tex. R. App. Proc. 52(a).

In addition, we find no oral or written objections by appellant on these grounds to the jury charge. If no objection is made at trial, a jury charge will be reversed only for error which created so much harm that appellant

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[31] Appellant argues further that his confessions were involuntary because he did not understand, and was not informed, that a conviction for capital murder could result in a death sentence. However, failure to inform an accused of the full extent of his possible exposure under the law goes to the knowing and intelligent nature of the *Miranda* waiver, not to its voluntariness. *Corwin v. State*, 870 S.W.2d 23, 32 (Tex.Crim.App. 1993). Therefore, appellant's failure to understand that he could receive the death sentence does not render his confessions involuntary.

was denied a fair trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1985).

In this case, appellant was allowed to present evidence of his mental impairment to the jury, and the trial court gave an instruction on voluntariness which accurately described the law. Points of error 99 and 100 are overruled.

GUILT/INNOCENCE PHASE

In points of error 75 and 76, appellant posits that the trial court erred by allowing State's witnesses Cindy Peters and Dr. Edward McClendon to testify over objection about statements made by the deceased before her death. Appellant asserts that the statements were hearsay and violated his right to confrontation under the Sixth Anendment.[32]

The issue pertaining to the testimony of Cindy Peters has already been addressed by this Court. *Penry v. State*, 691 S.W.2d at 646-47. We held that the deceased's statement to Peters was admissible as a spontaneous exclamation. *Id.* at 647. We also held that appellant's constitutional rights under the confrontation clause were not violated because the deceased was unavailable and the statement bore adequate indicia of reliability, *Id.*

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[32] Appellant further avers that his rights under the Eighth and Fourteenth Amendments were also violated. However, appellant makes no argument nor cites us to any authority. Thus, this proposition is inadequately briefed and not properly presented for our review. Tex. R. App. Proc. 74(f).

Under the doctrine of the law of the case, where determinations as to questions of law have already been made on prior appeal to a court of last resort, those determinations will generally be held to govern the case throughout all of its subsequent stages. *Ex parte Granger*, 850 S.W.2d at 516. This issue having been previously decided adversely to appellant, his 76th point of error is overruled.

In point of error 75, appellant complains about the testimony elicited from Dr. McClendon, the emergency room physician who treated the victim. McClendon testified that the deceased stated that she had been raped and gave him a description of her attacker:

> I asked her, you know, if this was a white man, and she said yes, and then, I asked what color his hair was and she told me it was black. I asked her, I asked about his size, and she said he was slim built and short.

Both appellant and the State concede that these were hearsay statements. *See* Rule 801(d).[33]

Appellant posits that these statements were inadmissable under the "medical treatment" exception to the hearsay rule because McClendon admitted he asked the deceased some questions, "I guess, for information. . . . " *See* Rule 803(4). Further, he states that neither statement could meet the "dying declaration" exception to the hearsay rule because the deceased's medical condition was stabilized for a short time in the emergency room. *See*

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[33] Unless otherwise indicated, all references to rules are to those in the Texas Rules of Criminal Evidence.

Rule 804(b)(2). We need not address these contentions, however, because the statements were properly admitted as "excited utterances" under Rule 803(2).[34]

An excited utterance is any "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2). While the period of time that elapsed between the occurrence of the startling event and the making of the statement is a factor to consider in determining the admissibility of such statements, the critical factor is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event. *McFarland v. State*, 845 S.W.2d 824, 846 (Tex.Crim.App. 1992).

A review of the record shows a startling event occurred in the instant case. The deceased was delivered to the emergency room approximately thirty to forty-five minutes after being stabbed. She had a sucking chest wound, a collapsed lung, a ruptured kidney, bruises to her face and side, and was bleeding profusely. She was not permitted any pain medication and she died within one and a half hours of her arrival. It is apparent to us that the deceased was still under the physical and emotional stress of the assault when she made the statements

[34] The trial court did not state the grounds upon which he admitted the statements. However, the trial court's decision will be upheld if it is correct on any theory of law applicable to the case. *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990).

about which appellant complains. *Id.* Finally, both statements made related to the circumstances of the startling occurrence. *Id.*[35]

Appellant's contention that his Sixth Amendment right to confrontation was violated must also fail. The confrontation clause requires a showing that a hearsay declarant is unavailable and that the statement bears adequate "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Reliability may be inferred where the evidence falls within a firmly rooted hearsay exception. *Id.*

As we held in *Penry v. State*, the deceased was obviously unavailable and the "excited utterance" exception to the hearsay rule is "old and firmly rooted." 691 S.W.2d at 647. The trial court did not err in admitting the statements. Point of error 75 is overruled.

In points of error 72 through 74, appellant complains of various photographs entered into evidence.[36] He asserts that the photographs were irrelevant and introduced solely to prejudice the jury.

A photograph is relevant if it has "any tendency to make the existence of any fact that is of consequence to

[35] We note that we would also find the statement admissible under the "dying declaration" exception. Rule 804(b)(2); *Herrera v. State*, 682 S.W.2d 313, 320 (Tex.Crim.App. 1984).

[36] At trial, appellant objected to the admission of State's exhibit 5, one of the above-mentioned photographs, only on the basis of relevance and victim impact. Since his trial objection failed to make a Rule 403 objection, he has not preserved that issue for our review. Tex. R. App. Proc. 52(a); *Barnes*, 876 S.W.2d at 325.

the determination of the action more probable or less probable than it would be without the evidence." Rule 401. The admission into evidence of photographs is within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Moreno v. State*, 858 S.W.2d 453, 463 (Tex.Crim.App. 1993). Our review shows that the trial court was justified in finding the evidence relevant to material issues in the case.

The identity of the victim and the manner and means of death are certainly facts that are of consequence to the determination of the action. *Long v. State*, 823 S.W.2d 259, 271 n.18 (Tex.Crim.App. 1991). State's exhibit 65, a portrait of the deceased, was introduced during the testimony of Bruce Carpenter, her former husband. The portrait was relevant to prove up the identity of the deceased. State's exhibits 52, 54A, 55A, and 56A depict the deceased's body at the autopsy. These were relevant to show the means of death and various other injuries sustained. State's exhibit 5 is a photograph of the deceased's small dog. The photo is relevant because it corroborated appellant's confession wherein he stated that the deceased ordered her dog to bite him and he kicked it away. *See Moreno*, 858 S.W.2d at 465; *Long*, 823 S.W.2d at 273.

When determining whether the trial court erred in admitting the relevant photographs into evidence, our review is limited to determining whether the probative value of the photos is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Rule 403; *Long v. State*, 823 S.W.2d at 271, citing *Montgomery v.*

State, 810 S.W.2d 372, 389 (Tex.Crim.App. 1991) (Opinion on Rehearing).

A court may consider many factors in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. These factors include: the number of exhibits offered, their gruesomeness, their detail, their size, whether they are in color or black and white, whether they are close-up, and whether the body depicted is clothed or naked. *Long*, 823 S.W.2d at 272. A court, however, should not be limited by this list. The availability of other means of proof and the circumstances unique to each individual case should also be considered. *Id.*

The portrait of the deceased was an 8" by 10" color photograph and was used to prove the identity of the deceased. We do not conclude that it's probative value was substantially outweighed by its prejudicial effect.

In reviewing the four autopsy photographs, we note initially that three were color and 3½" by 5" in size, and the remaining photograph was 8" by 10" and was black and white. Appellant does not explain why he believes the photographs were inflammatory and prejudicial. He does point out that they were cumulative. We fail, however, to conclude that the photos were cumulative because no other pictures of the wounds were offered into evidence. The photos were used at trial to show the wound causing death and the bruises to the deceased's side, back, and face. Although the pictures were gruesome and detailed, they were not enhanced in any way and portrayed no more than the gruesomeness of the injuries inflicted. *See Narvaiz*, 840 S.W.2d at 429. After

reviewing all of the objected-to photographs, we are not persuaded that the danger of unfair prejudice substantially outweighed their probative value. Therefore, we hold that the trial court did not err in admitting the exhibits.

Appellant also complains that the introduction of the complained-of exhibits presented evidence of victim impact. He cites, as direct authority, *Booth v. Maryland*, 482 U.S. 496 (1987).[37]

At appellant's trial, the witnesses identifying the deceased and the dog were questioned about their relationship with the deceased and the animal and the identification of both. There was no testimony as to opinions of appellant, the alleged crime, or the appropriate sentence. Thus, the testimony concerning the exhibits was not the type of evidence contemplated by *Booth v. Maryland*. The trial court did not err in admitting the exhibits. Points of error 72 through 74 are overruled.

In point of error 103, appellant argues that the trial court erred in failing to explain the meaning of "acquit" in the jury charge. Appellant contends that, without a definition, the jury may have believed that they would be

[37] The Supreme Court, in *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), held that the Eighth Amendment does not forbid victim impact testimony. *Payne* limits *Booth* to that part precluding evidence of a victim's family members' characterizations and opinions about the crime, the defendant and the appropriate sentence.

declaring appellant "completely innocent" if they acquitted him.[38]

As we stated previously with regards to the terms "rational," "reasonable," and "understanding," we do not believe that the term "acquit" has become so technical that it is a legal term of art requiring the trial court to define it. It is not necessary to define terms that are simple and used in their ordinary meaning; jurors are presumed to know such common meaning and terms. *Russell*, 665 S.W.2d at 780. The jury was entitled to give the term its common and ordinary meaning. Appellant's point of error 103 is overruled.

In points of error 104 through 106, appellant argues that the trial court erred in failing to include the statutory definition of "elements of the offense" in the jury charge. *See* Tex. Penal Code § 1.07(13). At trial, however, appellant asked the trial court to define "elements of the offense" as "both the required mental state, 'intentionally' and the prohibited acts." Because appellant's trial objection does not comport with his argument on appeal, any error is waived. Tex. R. App. Proc. 52(a); *Barnes*, 876 S.W.2d at 325; *Johnson*, 803 S.W.2d at 293.

Further, we note that the trial court did instruct the jury as to the applicable law. When a refused charge is substantially the same or is adequately covered by the

[38] The first time "acquit" is used, the jury charge states:

> If you do not so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of capital murder, and consider whether he is guilty of the lesser offense of murder.

charge given, there is no harm in the failure to give the refused charge. *Hawkins v. State*, 660 S.W.2d 65, 81-82 (Tex.Crim.App. 1983). In its charge to the jury, the court set out each element of the offense including the required culpable mental state. The instruction also contained the definition of "intentionally" and stated that the jury would have to find "beyond a reasonable doubt" that appellant intentionally committed the crime. We conclude the charge given adequately covered the charge refused. Points of error 104 through 106 are overruled.

In points of error 107 through 110, appellant contends that the trial court erred in refusing to instruct the jury to consider appellant's mental condition in making its determination of whether he had the specific intent to kill.[39] He argues that the statutory definition of

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[39] Appellant's requested instruction number three admonished the jury:

> If you find from the evidence that at the time the alleged offense was committed, the defendant had substantially reduced mental capacity, whether caused by mental illness, mental retardation, or other mental defect, or other cause, you must consider what effect, if any, this diminished mental capacity had on the defendant's ability to form the "intentional" mental state which is an element of the crime of capital murder.
>
> Thus, if you find that the defendant's mental capacity was diminished to the extent that you have a reasonable doubt whether he did intentionally commit the acts constituting capital murder, even if you find beyond a reasonable doubt that he performed the acts, you are to find the defendant not guilty of capital murder, and consider whether or not he is guilty of a lesser offense.

"intentional" given to the jury presupposes that the accused is able to connect his acts with their results. *See* Tex. Penal Code § 6.03(a). Therefore, he asserts, the jury was afforded no opportunity to give effect to the evidence of his poor reasoning ability and may have shifted the burden of proof to the defense on the issue of intent. Appellant also complains that the charge failed to emphasize to the jury that they should take all evidence, especially any abnormal physical or mental conditions, into account when deciding the issue of intent.

The trial court instructed the jury as follows on the issue of intent to kill and the burden of proof:

> A person commits capital murder when such person intentionally causes the death of another

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Appellant's requested instruction number four read:

> You are instructed that when a person is charged with an offense which requires that he act intentionally . . . you must take all of the evidence into consideration, and determine therefrom, if, at the time when the offense was allegedly committed, the person accused was suffering from some abnormal mental or physical condition, however caused, which prevented him from forming the intent essential to constitute the offense with which he is charged.
>
> If from all the evidence you have a reasonable doubt whether the defendant was capable of forming the intent necessary to constitute the offense of capital murder, you must give the defendant the benefit of the doubt, and find that he did not have such intent. In such event you are to say by your verdict that the defendant is not guilty of capital murder . . .

while such person is in the course of committing or attempting to commit the offense of aggravated rape. . . .

A person acts "intentionally," or with intent, with respect to the nature of his conduct or with respect to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. . . .

Unless you find from the evidence beyond a reasonable doubt that the defendant, on said occasion, specifically intended to kill the said Pamela Carpenter when he stabbed her, if he did stab her, you cannot convict him of the offense of capital murder.

The burden of proof in all criminal cases rests upon the State throughout the trial, and never shifts to the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.

Article 36.14 states that a jury charge should set forth the applicable law without expressing an opinion on the evidence, summing up testimony, or discussing facts or using jury argument to arouse the sympathy or excite the passions of the jury. Further, this Court has held that when the charge accurately describes the applicable law, a requested instruction specifically emphasizing evidence of mental retardation is an improper comment on the weight of the evidence. *Bell*, 582 S.W.2d at 812.

Here, the trial court instructed the jury to make findings as to appellant's intent to kill and other elements of

the offense from the evidence. The trial court also properly submitted the statutory definition of "intentional." *See* Tex. Penal Code § 6.03(a). Appellant presented extensive evidence on his mental handicap at trial and emphasized it during jury argument. We see no reason to conclude that the jury did not consider this evidence in making its findings. A specific instruction calling attention to the evidence on appellant's impaired mental abilities was unnecessary, and might have inappropriately vested this evidence with a disproportionate legal significance in the eyes of the jury. *See Bell*, 582 S.W.2d at 812.[40]

Appellant complains further that the trial court failed to narrow the range of offenders subject to the death penalty in the charge to the jury. He specifically states that persons with a substantial mental disease or defect may be unaware that their conduct is "wrong." Therefore, the trial court should have instructed the jury that these mentally-impaired persons could not be convicted of capital murder. We address this issue in point of error 132, *infra*. The trial court did not err in failing to submit this

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[40] Appellant's reliance on *Francis v. Franklin*, 471 U.S. 307 (1985), is misplaced. In that case, the Court struck down a jury charge which expressly stated a rebuttable presumption that "(a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts." *Id.*, at 311. The Court found that a reasonable juror might have viewed this instruction as mandatory. *Id.* However, the charge given by the trial court in this case set up no such explicit presumption which could have misled the jury. Appellant also reiterates the argument that he was entitled to an affirmative submission of a defensive theory under the rule stated in *Hill v. State*, 585 S.W.2d 713 (Tex.Crim.App. 1978). We have already addressed this issue.

instruction. Appellant's points of error 107 through 110 are overruled.

In his 111th through 114th points of error, appellant contends that the trial court erred in denying his requested jury instructions on "reasonable doubt" in both the guilt/innocence and punishment phases of trial. He argues that because his requested instructions are similar to the one required in *Geesa v. State*, 820 S.W.2d 154 (Tex.Crim.App. 1991), special circumstances apply to his case which justify the retroactive application of our holding in *Geesa*. During both phases of trial, appellant requested the following instruction:

> A reasonable doubt is based upon reason and common sense, and not the mere possibility of guilt. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such convincing character that a reasonable person would not hesitate to act and rely on it.

We have already held that it is not error for a trial court to refuse to define reasonable doubt during the guilt/innocence and punishment phases of a pre-*Geesa* case. *Barnes v. State*, 876 S.W.2d at 328.

Appellant further contends that the trial court erred in failing to give an instruction comparing the reasonable doubt standard to the standards of preponderance of the evidence and clear and convincing proof. We do not perceive this argument as novel. Requiring the trial court to compare the different standards of proof is merely another method of defining the term "reasonable doubt."

We have already held that was not required. Points of error 111 through 114 are overruled.

In point of error 114a, appellant claims that the trial court erred in not including an instruction in the charge on the lesser included offense of voluntary manslaughter. Appellant specifically argues that the lesser-included offense of voluntary manslaughter was raised because the jury may have disbelieved his two confessions, they may have believed the victim was not raped, and his diminished capacity for reasoning rendered him incapable of cool reflection.

In determining whether appellant is entitled to a charge on a lesser-included offense, we must consider all of the evidence introduced at trial, whether produced by the State or the defendant. *Goodwin v. State*, 799 S.W.2d 719, 740 (Tex.Crim.App. 1990); *Dowden v. State*, 758 S.W.2d 264, 269 (Tex.Crim.App. 1988). This Court uses a two-pronged test in its review. *Goodwin*, 799 S.W.2d at 740-741; *Dowden*, 758 S.W.2d at 268. First, the lesser-included offense must be included within the proof necessary to establish the offense charged. Second, there must be some evidence in the record that if the defendant is guilty, he is guilty only of the lesser-included offense. The credibility of the evidence and whether it conflicts with other evidence or is controverted may not be considered in determining whether an instruction on a lesser included offense should be given. *Rousseau v. State*, 855

S.W.2d 666, 672-73 (Tex.Crim.App. 1993); *Marras v. State*, 741 S.W.2d 395, 405 (Tex.Crim.App. 1987).[41]

Voluntary manslaughter is a lesser-included offense of capital murder. *Nobles v. State*, 843 S.W.2d 503, 511 (Tex.Crim.App. 1992). Therefore, appellant has met the first prong of the test. However, he fails to meet the second prong. A charge on voluntary manslaughter should be given when evidence is presented that the defendant acted "under the immediate influence of sudden passion arising from an adequate cause." Tex. Penal Code § 19.04(a); *Vuong v. State*, 830 S.W.2d 929, 938 (Tex.Crim.App. 1992). "Sudden passion" is defined as "passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation." Tex. Penal Code § 19.04(b). "Adequate cause" is "cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." Tex. Penal Code § 19.04(c).

The following evidence was adduced at trial: Appellant's confessions state that he became acquainted with the victim when he was assisting another man with a delivery of some appliances to her home about three weeks prior to October 25, 1979. On the morning of October 25th, he decided he would go to the victim's house and rape her. Appellant knew that if he went over

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[41] Overruled on other grounds by *Garrett v. State*, 851 S.W.2d 853, 860 (Tex.Crim.App. 1993).

to the victim's home and raped her, he would have to kill her because she would tell the police. After arriving at the victim's home, he forced his way in and threatened her with a pocket knife. After a struggle during which appellant hit the victim, knocked her to the floor, and shoved her into the stove, the victim managed to grab a pair of scissors and stab appellant in the back.

Appellant knocked the scissors out of the victim's hand and dragged her into the bedroom. The victim refused to get undressed so appellant kicked her with his boots and "stomped" her once. The victim eventually complied and pulled her underpants down by her knees. Appellant unzipped his pants and attempted to get on top of her, but the victim got up. Appellant pushed her back down to the floor, hit her two or three times in the chest, and threatened to kill her if she would not "make love" to him. Appellant then had intercourse with the victim for about thirty minutes.

After sexually assaulting the victim, appellant got up and retrieved the scissors. He then came back and sat on the victim's stomach. Appellant told her that he hated to kill her but he thought that she would squeal on him. He then plunged the scissors into her chest.

The defense and the State both presented evidence concerning appellant's mental status. Appellant had I.Q. scores ranging from the forties to the seventies. No evidence was presented concerning how appellant's mental status would affect his knowledge of right from wrong or how he would react to a victim's retaliation.

This Court has held that "[w]hen a defendant begins a violent criminal episode, his or her subsequent acts of

violence cannot constitute an 'adequate cause' so as to warrant an instruction on voluntary manslaughter." *Vuong*, 830 S.W.2d at 939. Thus, the trial court did not err.

Appellant further argues that because there was no corroborating evidence of rape or attempted rape,[42] he should have gotten a voluntary manslaughter charge. We disagree. The fact that the rape may not have been corroborated would merely require the trial court to submit an instruction on the lesser-included offense of murder. This was done. The trial court did not err in denying appellant's requested charge on voluntary manslaughter. Point of error 114a is overruled.

JURY ARGUMENT

In points of error 33 and 34, appellant contends that the prosecution made improper jury arguments. In point of error 33, appellant argues that the prosecutor engaged in improper argument by interjecting his personal opinion regarding appellant's guilt. He further asserts that the prosecutor's statements suggested that the prosecutor knew of "additional, undisclosed information obtained from the investigatory phase." The State made the following argument at trial:

> If you think he is not guilty, then, you can go back there and write on that line, not guilty. I, never in my life have I stood before a jury and said that, but, I feel that confident. I feel that strong about this case, and I am biased, I will

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[42] An emergency room nurse did testify that she observed a substance that she believed to be semen in the victim's vaginal area.

> tell you that right now, I am biased. I was in Livingston on October 25, 1979. I am very biased, and I want you to know it. I am an advocate, I represent the State of Texas in this case, and I came into this case believing that he was guilty. I came into this case with one thought in mind, and that is to present evidence to you so that you would be as convinced as I am of the guilt of this –
>
> * * *
>
> DEFENSE COUNSEL: Objection to the Prosecutor expressing his personal convictions about the testimony. That is improper.
>
> THE COURT: The objection is overruled. You are not to express your personal opinions, though, Mr. Price.

The prosecutor made his statement while discussing the standard of proof the jury would use during its deliberations. He stated that he was biased in his belief that his case was strong, but this belief was apparently based on the evidence he brought forth in trial. A prosecutor "may argue his opinions concerning issues in the case so long as the opinions are based on the evidence in the record and not constituting unsworn testimony." *Felder v. State*, 848 S.W.2d 85, 95 (Tex.Crim.App. 1992). Such was the case here. No error occurred. Point of error 33 is overruled.

In point of error 34, appellant challenges the following argument made at the guilt/innocence stage:

> Would Pam Carpenter [the victim] lie to you about [the rape]? Did she lie on October 25, 1979, as she was dying? I don't think so.

Citing *Menefee v. State*, 614 S.W.2d 167 (Tex.Crim.App. 1981), appellant contends that the foregoing argument constituted an improper attempt by the prosecutor to inject his personal opinion of the victim's credibility. The complained-of argument in *Menefee* was as follows:

> And Virse [a witness], I don't believe I have ever seen anybody that I thought was more honest than she is.

This Court concluded that the trial court reversibly erred in overruling defense counsel's objections to the State's argument. *Id.* at 168.

The argument in the instant case, however, did not constitute an attempt to personally vouch for the victim's honesty and credibility. Here, the victim was in the process of dying. The prosecutor's argument merely pointed out the inherent reliability of dying declarations. As such, the argument amounted to a reasonable deduction from the evidence and, therefore, fell into one of the permissible categories of jury argument. *Felder*, 848 S.W.2d at 94-95. Point of error 34 is overruled.

PSYCHIATRIC EVIDENCE

In points of error twelve through seventeen, appellant contends that the trial court erred in admitting the testimony of three expert witnesses based on "involuntary psychiatric examinations." He asserts these examinations violated his Fifth and Sixth Amendment rights under *Estelle v. Smith*, 451 U.S. 454 (1981).

Before appellant's July 1990 trial, defense counsel requested a hearing to determine appellant's competency to stand trial. In addition, defense counsel filed a notice of intent to raise the issue of insanity.[43] The State then asked the trial court to appoint a disinterested psychiatrist to examine appellant. The trial court granted the State's request and appointed Drs. Fred Fason and Walter Quijano to examine appellant for competency. A jury later found appellant competent to stand trial.

At trial, the State presented three psychiatric witnesses. Dr. Fason testified at guilt/innocence in rebuttal concerning appellant's mental retardation. Drs. Quijano and Stanton Samenow testified at punishment concerning future dangerousness. Samenow did not examine appellant. Appellant also complains about a 1977 competency examination performed by Dr. Felix Peebles for a previous aggravated rape conviction that was used by Fason, Quijano, and Samenow in reaching their conclusions.

Applicable Law

In *Estelle v. Smith*, the Court held that, because the defendant was not informed that what he said during the competency examination could be used against him at the punishment phase of his capital trial on the issue of future dangerousness, his Fifth Amendment right against compelled self-incrimination was violated. The Court left open the issue of the admissibility of such compelled testimony in response to a defendant's assertion of the

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[43] Appellant later withdrew the notice on May 22, 1990. The competency trial took place May 7-16, 1990.

insanity defense or to a defendant's use of psychiatric evidence in his own behalf on the issue of future dangerousness. The Court further held that Smith's Sixth Amendment right to counsel was violated because, even if Smith's counsel had been informed about the examination, his counsel was not aware that the examination would include an inquiry into Smith's future dangerousness. 451 U.S. at 471.

In *Buchanan v. Kentucky*, 483 U.S. 402 (1987), the Supreme Court addressed the issue left open in Smith concerning the State's use of psychiatric testimony for *rebuttal* purposes when the defendant has initiated the use of psychiatric evidence. In *Buchanan*, defense counsel joined with the prosecutor in a motion for involuntary hospitalization of the defendant for treatment of mental illness. At trial, the defendant attempted to establish the affirmative defense of "extreme emotional disturbance," relying on psychological reports and letters read into the record by a social worker. *Id.* at 408-09. In response, the prosecutor introduced part of a report made by a doctor concerning his observations about the defendant's mental state when the defendant was involuntarily hospitalized. Buchanan objected that his Fifth and Sixth Amendment rights under *Smith* were being violated because his counsel had not been present during the exam and he had not been informed that the results could be used against him at trial.

Relying on language in *Smith*, the Court stated:

> [I]f a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Id. at 422-423 (citations omitted). The Court noted this report did not describe any statements made by the defendant dealing with the offenses for which he had been charged. The Court concluded that use of such a report for "this limited rebuttal purpose" was not a Fifth Amendment violation. *Id.* at 424.

Next, the Court held Buchanan's Sixth Amendment rights were not violated. The proper concern of the Sixth Amendment is whether the defendant had effective consultation with counsel. Effective consultation must be based on counsel being informed about the scope and nature of the proceeding. *Id.* at 424. The Court held on the facts of *Buchanan*:

> There is no question that [Buchanan's] counsel had this information. To be sure, the effectiveness of the consultation also would depend on counsel's awareness of the possible uses to which petitioner's statements in the proceeding could be put. Given our decision in *Smith*, however, counsel was certainly on notice that if, as appears to be the case, he intended to put on a "mental status" defense for [Buchanan], he would have to anticipate the use of psychological evidence by the prosecution in rebuttal.

Id. at 424-25.

Discussion

During the guilt/innocence phase of the instant case, Dr. Fason testified in rebuttal to appellant's mental-status evidence. Concerning his examination of appellant, Fason discussed his general observations of appellant such as whether appellant was able to control himself during the interview and whether he was coherent. The only testimonial evidence attributed to appellant was whether he could identify his defense counsel present at the interview. No other testimonial evidence was discussed. *Cf. Smith*, 451 U.S. at 464 and 465 n. 9. Fason did state that he used his interview with appellant in reaching his conclusions regarding appellant's I.Q. tests and mental retardation.

As in *Buchanan*, appellant presented mental health evidence by having a third-party[44] read into the record various reports concerning appellant's I.Q. and mental retardation. While the reports did not state that appellant was insane or incompetent at the time of the offense, their information regarding appellant's mental status was part of the foundation upon which appellant based his defense. Further, language in *Smith* and *Buchanan* indicates that if a defendant introduces psychiatric evidence in some form, the State may also introduce psychiatric evidence in some form. *Smith*, 451 U.S. at 465-466; *Buchanan*, 483 U.S. at 422. Therefore, appellant's Fifth Amendment privilege was not violated at the guilt/innocence phase by the State's use, in rebuttal, of testimony

[44] A member of the defense team.

by Fason concerning appellant's I.Q. and mental retardation.[45]

Further, appellant's counsel was on notice that if he intended to put on a "mental status" defense, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal. *Buchanan*, 483 U.S. at 424-25.[46] The Sixth Amendment danger addressed by the Supreme Court is failure to notify counsel of a psychiatric examination concerning future dangerousness. *Smith*, 451 U.S. at 471; *Satterwhite v. Texas*, 486 U.S. 249, 254 (1988); *Powell v. Texas*, 492 U.S. 680, 681 (1989). Appellant was not examined for future dangerousness; nor did Fason testify

[45] Appellant also specifically complains that Fason expressed an opinion that appellant had an "antisocial personality disorder." Despite appellant's assertions, we view the testimony as rebuttal to appellant's evidence. First, Fason describes how the disorder could affect the accuracy of an I.Q. test. Second, when he was asked, "Do you have a diagnosis with respect to any other aspects of his mental status in *1979*?" Fason responded that appellant had the disorder. Because Fason did not examine appellant until 1990, his opinion regarding the antisocial disorder had to be based on records and reports prior to the instant offense. We also note that when Fason was specifically asked whether he noted any disorder during his interview with appellant, he replied that nothing in the interview stood out to him as being relevant to the question.

[46] At a hearing on pretrial motions, the trial court stated that Fason's and Quijano's examinations would not be used at trial *unless* the defense put on psychiatric evidence; at that point the "evidence might be admissible." We also note appellant's counsel was present at both the Fason and Quijano examinations and would not allow either doctor to read appellant his statutory rights.

about it. Therefore, no error occurred. Points of error sixteen and seventeen are overruled.

At punishment, Dr. Quijano testified as to appellant's future dangerousness. However, Quijano did not base his opinion on his examination of appellant:

> Q [By State] Dr. Quijano, the last question that I asked you pertained to the likelihood of this Defendant committing a criminal act of violence in the future, and you testified, to the various elements and basis that you arrived at that opinion, and I want to specifically ask you, did you, in arriving at that opinion, rely upon your personal interview with the Defendant, back in May, to reach that opinion or conclusion?
>
> A No, I did not.

Because Quijano did not use his examination of appellant to reach his conclusion, no error occurred.[47] *See Hernandez v. State*, 805 S.W.2d409, 412 (Tex.Crim.App. 1990). Points of error twelve and thirteen are overruled.

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[47] Appellant specifically complains that Quijano also expressed an opinion that appellant had an "antisocial personality disorder" and that the opinion must have come from his interview of appellant. Appellant mischaracterizes the source of the diagnosis. First, we note that Quijano stated that he did not observe any type of mental illness in appellant during the interview. He further testified that he had "not definitely diagnosed him, I am going by previous evaluation." Quijano did not use his examination of appellant to reach this opinion. Quijano viewed extensive records dealing with appellant's mental and criminal history. More than one of these reports state that appellant had an antisocial personality disorder.

As for the 1977 examination by Dr. Peebles, appellant contends first that it was involuntary. However, Clayton Malone, appellant's former defense counsel for the unrelated 1977 rape case, testified that he requested the examination himself.[48] Therefore, no Sixth Amendment violation occurred. Further, no expert witness referred to any testimonial statements by appellant in the report.

Next, appellant maintains that the Peebles' exam violated his Fifth Amendment rights. He asserts that Samenow's opinion of future dangerousness was based on the Peebles' examination. Samenow never made such a statement. He merely stated that the Peebles' exam was one of many documents he reviewed in coming to his conclusion. Appellant also asserts that Quijano and Fason relied on the Peebles' exam. However, Quijano never stated he used the exam and, even though he mentioned he reviewed the exam, Fason did not testify as to future dangerousness.

We hold *Estelle* is inapplicable to the facts of this case. The Peebles' exam was conducted two years prior to the offense at issue here and thirteen years prior to the capital murder trial which is the subject of this appeal.[49] As we stated in *Nelson v. State*:

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[48] Malone testified at an evidentiary hearing concerning the admission of evidence of the prior rape conviction during the punishment phase.

[49] It should be remembered that the trial which is the subject of this appeal is actually the second trial of appellant since his first case was appealed to and reversed by the Supreme Court. *See Penry v. Lynaugh, supra.*

> The Fifth Amendment is not implicated because, at the time appellant made his statements, he was not confronted with someone who was essentially an agent for the State whose function was to gather evidence that might be used against him in connection with the crime for which he was incarcerated.

848 S.W.2d 126, 135 (Tex.Crim.App. 1992) (statements made to psychiatrist, etc., while incarcerated for a previous offense). The trial court did not err. Points of error fourteen and fifteen are overruled.

Finally, appellant asserts that the State improperly used and relied on each of the experts' testimony during closing argument. He also specifically states that the prosecutor argued at punishment that Fason testified as to future dangerousness. Because appellant failed to object to any of these arguments when made, he has preserved nothing for our review. Tex. R. App. Proc. 52(a); *Johnson*, 803 S.W.2d at 291.

PUNISHMENT PHASE

In his 65th point of error, appellant avers that the trial court erred in denying appellant's request to make an opening statement at the punishment phase. Appellant relies on Article 36.01 as authority.

Article 36.01 sets out the order of proceedings at the guilt/innocence phase of trial. The failure to allow a defendant to make an opening statement under the provisions of the article constitutes reversible error. *Farrar v.*

State, 784 S.W.2d 54, 56 (Tex.App. – Dallas 1989). However, Article 36.01 does not apply to the punishment phase of trial.

For capital cases, Article 37.071 requires the trial court to conduct a separate sentencing proceeding before the jury to determine whether the defendant shall be sentenced to death or life imprisonment. The article is silent as to whether the State or the defendant has a right to an opening statement.

Even if we were to follow appellant's argument that Article 36.01 is applicable at the punishment phase, the trial court still would not have erred in denying his request. Article 36.01 allows a defendant to make an opening statement prior to presentation of the State's case only when the State first makes one. *Moore v. State*, 868 S.W.2d 787, 790-91 (Tex.Crim.App. 1993). The State did not request or make an opening statement during punishment. Point of error 65 is overruled.

In points of error eighteen through 25, appellant argues that the trial court erred in admitting State's exhibits 91 and 96 through 102. Appellant alleges these exhibits contain documents which are inadmissible because they (1) constitute hearsay, (2) are irrelevant, (3) have prejudicial character which outweighs their probative value, (4) violate his Sixth Amendment right to confront witnesses, and (5) violate his Fifth and Sixth Amendment rights with respect to custodial examinations of appellant. We find no reversible error.

We first note that appellant made no objections to exhibit 98[50] at trial. Therefore, nothing is preserved for our review. Tex. R. App. Proc. 52(a); *Johnson*, 803 S.W.2d at 291. Point of error 21 is overruled.

Further, appellant has provided no argument or authority regarding his relevancy, prejudice,[51] and custodial examination claims. Therefore, we consider these issues inadequately briefed and as presenting nothing for our review. Tex. R. App. Proc. 74(f); *Robinson*, 851 S.W.2d at 222 n.4.

Exhibits 91, 96, 97, 99, 100, 101, and 102 each include records from a particular mental-health facility, school, or other institution with which appellant had been involved.[52] These records contain appellant's various I.Q. scores, mental health background, and evaluations. Appellant also cites specific portions of exhibits 91, 96, and 97 pertaining to medical records documenting alleged past homosexual and arson-related activities. The prosecutor referred to the disputed exhibits, in some cases before they were admitted into evidence, in his cross-examination of defense expert Dr. Randall Price and

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[50] Exhibit 98 is an educational progress report from the Mexia State School. The report notes that appellant had a disciplinary problem.

[51] Appellant does cite us to Rule 403. However, he fails to explain its applicability to the case at hand. We decline to make appellant's arguments for him.

[52] The University of Texas Medical Branch-Galveston, Texas Department of Corrections, Austin State Hospital, Rusk State Hospital, Mexia State School, Goose Creek Independent School District, Polk County MHMR, and the Texas Rehabilitation Commission.

others. The documents were offered during the cross-examination of Price.

Appellant first complains that the foregoing exhibits contain hearsay and hearsay within hearsay. Aside from those stated above, appellant has not pointed out which portions of the exhibits contain hearsay. After a review of each exhibit, we conclude that any objectionable hearsay seems to involve appellant's disciplinary problems as a youth, his activities concerning arson, his previous rape conviction, and his alleged homosexuality. We agree with appellant that these portions of the exhibits constitute hearsay. *See* Rule 801. However, any error in the admission of the evidence was harmless, because the evidence was also presented to the jury through other means. *See* Tex. R. App. Proc. 52(a).

As noted before, exhibit 98 was admitted without objection. Therefore, any other reference regarding appellant's disciplinary problems while in school were properly admitted into evidence. Evidence of appellant's arson charge came into evidence through exhibit 95-C[53] and the testimony of his aunt, Patsy Fuller Ross. Proof of appellant's previous rape conviction came in through his "pen packet" and plea papers for the extraneous offense,[54] the testimony of Nell Lowe, the District Clerk of Polk County, and the testimony of the rape victim. Finally, evidence of appellant's homosexuality also came

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[53] No objection was made to exhibit 95-c on hearsay grounds.

[54] State's exhibits 60, 88, 89, and 90.

into evidence through the unobjected-to testimony of his sister, Trudy Ross.

We further note that evidence regarding appellant's homosexuality and arson-related activities was also properly addressed during the State's cross-examination of Dr. Price. *See* Rules 703 and 705. Dr. Price testified that he reviewed two of the eight specific documents cited by appellant in his brief: a letter dated August 15, 1973, from Dr. Exter Bell to Mr. William Leikam, which discusses alleged homosexual and fire-setting activities by appellant, and an admission note to the Austin State Hospital Adolescent Center dated September 17, 1973, discussing past arson charges and appellant's father's reaction to appellant's homosexual activities at the Mexia School.

Rules 703 and 705 allow an expert witness to rely on inadmissible evidence under limited circumstances when testifying. *See Joiner v. State*, 825 S.W.2d 701, 707 (Tex.Crim.App. 1992). This Court has said that during cross-examination of an expert witness, it is improper to disclose the results of studies by asking leading questions when it has not been established that the expert relied on those studies in his testimony. *Ramirez v. State*, 815 S.W.2d 636, 651 (Tex.Crim.App. 1991). However, Dr. Price testified that he did review these two documents at the request of defense counsel. Because Dr. Price relied on evidence of appellant's homosexual and arson-related acts in his testimony, the State's questions about these topics during cross-examination were not improper.

Appellant next maintains that the admission of these documents violated his rights under the confrontation clause of the Sixth Amendment because the documents

contain generalized statements from sources of unknown reliability. However, out-of-court statements, even by unidentified informants, are admissible for sentencing purposes and do not violate the confrontation clause, where there is additional corroboration. *U.S. v. Young*, 981 F.2d 180, 187 (5th Cir. 1992), *cert. denied*, *Allman v. U.S.*, 113 S.Ct. 2454 (1993) and *Crow v. U.S.*, 113 S.Ct. 2983 (1993); *U.S. v. Rodriguez*, 897 F.2d 1324, 1328 (5th Cir. 1990), *cert. denied*, 498 U.S. 857 (1990). The disputed statements from appellant's medical records were corroborated by statements made by in-court witnesses available for cross-examination and by other records submitted by appellant.

In addition, the rights of confrontation and cross-examination are not absolute. Cross-examination is not necessary where the evidence bears indicia of reliability sufficient to ensure the integrity of the fact-finding process. *Porter v. State*, 578 S.W.2d 742, 745 (Tex.Crim.App. 1979). Most of the disputed statements were made many years ago by appellant's family, doctors, and nurses in the context of appellant's medical treatment, and not in the context of this criminal proceeding. Thus, the circumstances surrounding these statements show indicia of reliability, since the declarants had no obvious motive for bias against appellant and in many cases described the events while they were fresh on their minds. Points of error eighteen through 25 are overruled.

In points of error 27 and 28, appellant contends that the trial court erred in excluding two exhibits offered in mitigation during the punishment phase. The trial court excluded these exhibits containing the mental health

records of appellant's mother because they were irrelevant. Appellant argues the records were relevant because they contained evidence that appellant's mother suffered from severe mental illness, thus bolstering the testimony of his mitigation witnesses that he had been abused by her.

The mental health records in question described the hospitalization of appellant's mother for post-partum psychosis on two occasions. The records did not discuss whether appellant's mother abused any of her children, or even whether her mental condition made it likely that she would abuse her children. There was no evidence that her psychological problems would have led to child abuse. Because appellant explicitly offered this testimony for the purpose of reinforcing his evidence that his mother abused him, it was not relevant and was, therefore, inadmissible. *See* Rules 401 and 402. Points of error 27 and 28 are overruled.[55]

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[55] Appellant cites two inapplicable cases in support of his theory that the records should have been admitted. In *Gribble v. State*, we held that the defendant's mother's mental health records were admissible where defendant was attempting to show that his childhood was unstable because his mother was hospitalized for mental problems for years and, as a result, the children were sent to live with various relatives. 808 S.W.2d 65, 75-76 (Tex.Crim.App. 1990). The records at issue also explained how the defendant's mother's mental disorder resulted in her sexual abuse of defendant. *Id.* Appellant's mother's records in the instant case do not link child abuse with her condition or even mention actual or potential child abuse. The second case cited by appellant is non-binding on this Court and involves facts which are completely unrelated to appellant's case. *See Buttrum v. Black*, 721 F.Supp. 1268, 1314-1315 (N.D. Ga. 1989).

In point of error 77, appellant maintains that the trial court erred in allowing Dr. Stanton Samenow to testify as an expert on mental retardation. Appellant argues that Samenow was not qualified to give his expert opinion on the subject. Appellant does not question the doctor's expertise on any other subject about which he testified.

The special knowledge which qualifies a witness to give an expert opinion may be derived from specialized education, practical experience, a study of technical works, or a varying combination of these things. Rule 702; *Holloway v. State*, 613 S.W.2d 497, 501 (Tex.Crim.App. 1981). Whether a witness offered as an expert possesses the required qualifications is a question which rests largely in the trial court's discretion, and the decision to admit or exclude the testimony will not be disturbed absent a clear abuse of discretion. *Duckett v. State*, 797 S.W.2d 906, 910 (Tex.Crim.App. 1990). The party proffering the expert witness bears the burden of showing that the witness is qualified on the specific matter in question. Rule 702.

Appellant objected to Samenow's testimony because he had not been qualified as being an expert on mental retardation. We disagree. The State asked various questions regarding Samenow's experience and training in the areas of clinical psychology. Samenow testified to his extensive educational background and professional memberships, and listed several publications he authored dealing with criminal psychology. He further testified that he had been teaching at professional seminars on criminal behavior for various groups, including mental health professionals, since 1977. He conducted a study in forensic psychiatry for seventeen years at St. Elizabeth's

Hospital, which was run by the National Institute for Mental Health.

After the State asked Samenow if he had reviewed appellant's various IQ tests taken over the years and how they pertained to his varying degrees of assessed mental retardation, appellant objected that the State had not laid a foundation for Samenow's expertise on mental retardation. The trial court overruled his objection. Samenow then testified about his familiarity with I.Q. tests, their relationship to determining mental retardation, and the differences between the various tests that are given.

The trial court did not abuse its discretion in allowing Dr. Samenow to testify about the relationship between appellant's I.Q. tests and his mental retardation. Point of error 77 is overruled.

In a similar argument, in point of error 26, appellant contends that the State elicited an inadmissible lay opinion which was outside the scope of the defense witness' expertise. Specifically, appellant called Dr. Randolph Price to testify as a defense expert regarding neuropsychology, organic brain damage, mental retardation, and the effects of malingering on relevant psychological tests. On cross-examination, the State questioned Price about appellant's future dangerousness. The State contends that appellant failed to preserve any error. We agree.

The following occurred during cross-examination:

> THE PROSECUTOR: Based on your examination of those records that were furnished to you, as well as those others that you gave Dr. Mount, if you saw any of them, and based on all of your

> training, and experience and all of your qualifications, that you told the jury about yesterday, in your opinion, Doctor, is [appellant] a dangerous individual?
>
> DEFENSE COUNSEL: objection, Your Honor.
>
> * * *
>
> No basis for asking this witness about that, that is not the subject of his testimony.
>
> THE COURT: Overrule the objection.
>
> DR. PRICE: If he was in the free world, I would consider him dangerous.

Appellant's trial objection does not comport with the issue raised on appeal. Therefore, he has preserved nothing for our review. *Barnes*, 786 S.W.2d at 325; *Johnson*, 803 S.W.2d at 293. We do note that appellant later made the proper objection. However, Price had already stated his opinion. To be timely, an objection must be raised at the earliest opportunity or as soon as the ground of objection becomes apparent. Tex. R. App. Proc. 52(a); *Barnes*, 876 S.W.2d at 325. Appellant's 26th point of error is overruled.

In points of error 29 and 31, appellant contends that the trial court erred in not instructing the jury that, and in not allowing in evidence that, if not given the death penalty he would spend the remainder of his life in jail.

At punishment, appellant attempted to have admitted the following "waiver of parole":

> July 16, 1990
>
> I, Johnny Penry, am putting my name on this paper to show that I want to give up my

> right to parole for the rest of my life. I understand that I cannot change my mind later, and that I will have to serve life in prison, without parole.
>
> /s/
> Johnny Paul Penry

The trial court denied appellant's request. On appeal, appellant cites no authority or argument as to why this document would be binding. He instead claims that whether the document is binding is irrelevant,[56] but that the issue of waiver is nevertheless relevant to the jury's consideration of future dangerousness. He notes that if the document had been admitted into evidence, it would have "opened the door to other evidence on the realistic likelihood of Penry's parole, perhaps including expert witnesses for both sides."

Appellant further objected to the charge as a whole because it failed to "instruct the jury that it must presume that the defendant will remain in prison for his entire life when considering the evidence, if any, related to a 'continuing threat to society.' "

The matter of parole or a defendant's release thereon is not a proper consideration for a jury's deliberations in the punishment phase of a capital murder trial. *Stoker v. State*, 788 S.W.2d 1, 16 (Tex.Crim.App. 1989); *White v.*

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[56] Appellant argues that the fact he signed the document is the only relevant fact. He also states that the defense was prepared to prove he knew what the document meant when he signed it. We find this ironic considering appellant's earlier arguments that he was not intelligent enough to sign his confession or waive his *Miranda* rights.

State, 629 S.W.2d 701, 708 (Tex.Crim.App. 1981); *but see Simmons v. South Carolina*, ___ U.S. ___, 114 S.Ct. 2187 (1994). A jury's only task at the punishment phase is to answer the special issues as required in Article 37.071. *Stoker*, 788 S.W.2d at 16. It has also been consistently held that it is not error for a trial court to refuse appellant's requested instruction to the jury explaining the parole laws of this state. *Id.*; *O'Bryan v. Estelle*, 714 F.2d 365 (5th Cir. 1983), *cert. denied*, 465 U.S. 1013 (1984).

The effect of appellant's request and objection was to place the issue of parole before the jury. Because this was an impermissible area of inquiry for the jury, the trial court did not err. Further, appellant's "waiver" is no more than an attempt to create "life without parole," which the Legislature has not yet seen fit to create. Points of error 29 and 31 are overruled.

In point or error 30, appellant contends that the trial court failed to instruct the jury not to speculate on the possibility of parole if appellant were to receive life imprisonment. The trial court instructed the jury:

> In reaching your decision, you must not consider what effect, if any, the laws on parole will have upon a life sentence.

We do not perceive a difference between what appellant desired to have included in the charge and the trial court's actual instruction. Accordingly, we hold that appellant's point of error 30 is without merit and is overruled.

In appellant's 32nd point of error, he maintains that the trial court erred in overruling his motion for mistrial premised on the State's improper argument based on the

possibility of parole. Appellant complains of the following argument:

> Dr. Felix Pebbles (sic) . . . said that it is my further professional opinion, that if [appellant] were released from custody, that he would be dangerous to other persons. That was written on May 19, 1977. Two years later, and in August of 1979, (appellant) was released from custody on parole, less than sixty days later, he murdered and raped Pam Carpenter. You have a responsibility to see that that never occurs again.

Appellant did not object to the argument or request an instruction to disregard but moved for a mistrial after the jury had already retired to begin its deliberations.

The proper method of preserving error in cases of prosecutorial misconduct is to (1) object on specific grounds, (2) request an instruction that the jury disregard the comment, and (3) move for a mistrial. *Cook v. State*, 858 S.W.2d 467, 473 (Tex.Crim. App. 1993). By failing to object at the earliest possible moment, appellant has preserved nothing for our review. Tex. R. App. Proc. 52(a).

In points of error one through eleven and 78 through 80, appellant complains that the trial court submitted an improper jury instruction on mitigating evidence. We disagree.

At punishment, the jury must be allowed to consider and give effect to proffered evidence regarding the defendant's background, his character, and circumstances surrounding the offense that, reasonably, could be thought, mitigating and warranting a sentence less than death. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v.*

Ohio, 438 U.S. 586, 605-06 (1978). As the Supreme Court stated in *Penry v. Lynaugh*:

> Underlying *Lockett* and *Eddings* is the principle that *punishment should be directly related to the personal culpability of the criminal defendant*. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

492 U.S. at 319 (emphasis added).

The special issues required by Article 37.071 allow the jury to consider and give effect to most types of mitigating evidence. *Jurek v. Texas*, 428 U.S. 262, 273-74 (1976). However, defendants occasionally proffer mitigating evidence that is not relevant to the special issues or that has relevance to the defendant's moral culpability beyond the scope of the special issues. *Penry v. Lynaugh*, 492 U.S. at 329. In such a case, the jury must be given a special instruction in order to allow it to consider and give effect to such evidence. *Id.* The trial court in the instant case submitted the following charge:

> You are instructed that when you deliberate on the questions posed in the Special Issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any

aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

We have already held that a nullification instruction such as this one is sufficient to meet the constitutional requirements of *Penry v. Lynaugh*. *Coble v. State*, 871 S.W.2d 192, 206-207 (Tex. Crim. App. 1993), *cert. filed; see also Coleman v. State*, 881 S.W.2d 344, 356 (Tex.Crim.App. 1994). Points of error one through eleven and 78 are overruled.

Appellant addresses points 11a and 11b in a footnote. Without citing any authority, he asserts that because the charge did not instruct the jury to construe the terms "reasonable" and "unreasonable" in the first and third special issues to encompass his mitigating evidence, the jury did not have a vehicle with which to give effect to such evidence. Appellant makes no further argument. We will not entertain arguments which are inadequately briefed. Tex. R. App. Proc. 74(f). Points of error 11a and 11b are overruled.

In points of error 79 and 80, appellant maintains that the instruction did not include a clear and accurate definition of mitigating evidence and circumstances. The trial court submitted the following definition:

> A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case.

Appellant does not contest this definition *per se*. He complains that the trial court limited its application by instructing the jury to "give effect and consideration to [the mitigating circumstances] in assessing the *defendant's personal culpability*" and by deciding whether a death sentence "is an appropriate response to the *personal culpability* of the defendant." He also asserts that by not defining "personal culpability," the instruction did not distinguish it from "guilt"; therefore, he argues, it allowed the jury to not consider any mitigating evidence that failed to cast a doubt on appellant's guilt. Again, we have previously approved the use of such an instruction. *See Coble*, 871 S.W.2d at 206-07; *Coleman*, 881 S.W.2d at 356. Points of error 79 and 80 are over-ruled.

In his 81st and 82nd points of error, appellant complains that the trial court violated the Eighth Amendment by instructing the jury that "you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all the evidence before you and in answering the special issue." Specifically, appellant argues that the instruction precludes the jury's proper consideration of his mitigating evidence.

We have already addressed the validity of this exact charge. *Wheatfall v. State*, 882 S.W.2d 829, 842 (Tex.Crim.App. 1994). Because appellant raises no novel argument to persuade us to revisit this holding, we overrule his 81st and 82nd points of error.

In points of error 83 through 86, appellant posits that the trial court erred in failing to instruct the jury that the burden of proof was on the State to disprove the existence of sufficient mitigating circumstances, and to prove beyond a reasonable doubt that there were insufficient mitigating circumstances to make the death sentence inappropriate. We disagree.

This Court has previously stated:

> Neither this Court nor the Texas Legislature has ever assigned a burden of proof on the issue of mitigating evidence. *See* Article 37.071. The Eighth and Fourteenth Amendments do not require that a burden be placed on the State. In a plurality opinion, the United States Supreme Court in *Walton v. Arizona* affirmatively declined to "adopt as a constitutional imperative a rule that would require the court to consider the mitigating circumstances claimed by a defendant unless the State negated them by a preponderance of the evidence." 497 U.S. 639, at 650, 110 S.Ct. 3047, at 3055, 111 L.Ed.2d 511, at 526 (1990) (plurality opinion). The plurality in *Walton* further held that it is not unconstitutional to place a burden on the defendant to establish sufficient mitigating circumstances by a preponderance of the evidence. *Id.* U.S. at 649-651, S.Ct. at 3055-56, L.Ed.2d at 525-27. Because neither legislation nor constitution places a burden of proof upon the State to negate the existence of mitigating evidence, we refuse to fault the trial court for failing to give the jury such an instruction.

Barnes, 876 S.W.2d at 330. We decline to reconsider the issue. Appellant's points of error 83 through 86 are overruled.

In appellant's 87th and 88th points of error, he contends that the trial court erred in not affirmatively submitting his defensive theory of mitigation. Specifically, appellant objected that the trial court failed "to submit each of the mitigating circumstances that [he] had clearly proffered for the jury's consideration – mental retardation, brain impairment, and child abuse." The State responds that there is no requirement that the mitigating factors be spelled out. We agree.

During punishment, jurors must not be precluded from considering any relevant mitigating evidence in answering the special issues. *Cuevas*, 742 S.W.2d at 345-36; *Allridge*, 850 S.W.2d at 482. However, the trier of fact is not mandated to give any specified weight to a particular piece of evidence. *Id.* "The amount of weight that the fact-finder must give any particular piece of mitigating evidence is left to the range of judgement and discretion exercised by each juror." *Id.*

Because each individual juror decides whether he believes a particular piece of evidence may or may not be mitigating, we conclude that it was not error for the trial court to deny appellant's objections to the charge. Points of error 87 and 88 are overruled.

Finally, in his 132nd point of error, appellant asserts that it would be cruel and unusual punishment under the

Eighth Amendment to execute a person like himself "given his mental retardation, brain damage, and history of suffering severe and protracted abuse as a child." He argues that, because of his mitigating circumstances, he lacked the moral culpability to be sentenced to death.

The Eighth Amendment does not preclude the execution of mentally retarded persons. *Penry v. Lynaugh*, 492 U.S. at 335-38. Nor is there authority stating that it is unconstitutional to execute persons who have brain damage or were abused as children. "So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination of whether 'death is the appropriate punishment' can be made in each particular case." *Id.* The jury in the instant case had the means to consider all of the evidence, including appellant's mitigating circumstances, and yet determined that death was the appropriate punishment. Because appellant's sentence does not violate the Eighth Amendment, we overrule his 132nd point of error.

The judgment of the trial court is AFFIRMED.

Per Curiam[57]

(Delivered February 22, 1995)
En Banc
Publish

Clinton, Overstreet and Meyers, JJ., concur in the result

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[57] This opinion was originally prepared by Judge Charles F. "Chuck" Campbell prior to his leaving the Court.

JOHNNY PAUL PENRY, Appellant
NO. 71,130 v. Appeal from POLK County
THE STATE OF TEXAS, Appellee

CONCURRING OPINION

I concur in the disposition of point of error 26, believing the objection was sufficient to preserve the error but believe the error was harmless. Tex. R. App. P. 81(b)(2). I concur in the disposition of point of error 71 for the reasons stated in *Buchanan v. Kentucky*, 483 U.S. 402 (1987). I concur in the disposition of point of error 75, believing the statements of Dr. McClendon were erroneously admitted but the error was harmless. Rule 81(b)(2).

With these comments, I join only the judgment of the Court.

BAIRD, Judge

(Delivered February 22, 1995)

En banc

Publish

JOHNNY PAUL PENRY, Appellant

NO. 71,130 v. Appeal from POLK County

STATE OF TEXAS, Appellee

CONCURRING OPINION

I join the opinion of the majority, but write separately to add some additional comments related to appellant's points of error 107-110.

While I agree with the majority that the requested instruction on the defense of diminished capacity would have amounted to a comment on the weight of the evidence and was therefore properly denied, I write to caution that this conclusion should not be taken to mean that such a theory is not a viable one for the presentation of defensive evidence and argument. This Court has previously addressed the theory of diminished capacity,[1]

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[1] A distinction should be made between diminished capacity as an "affirmative defense" and diminished capacity as evidence rebutting the element of mens rea. For instance, in *United States v. Pohlot*, the Third Circuit made this critical distinction in interpreting the Insanity Defense Reform Act as barring evidence of mental disease or defect as an "affirmative defense" that "excuses" conduct, but not as evidence that simply disproves an element of the offense. 827 F.2d 889, 897 (3rd Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988). One commentator elaborated on the distinction between these concepts:

> [T]he mens rea variant of diminished capacity is not a separate defense that deserves to be called "diminished capacity" or any other name connoting that it is some sort of special, affirmative defense. [ ] The defendant is simply introducing evidence, in this case evidence of mental abnormality, to make the following claim: "I did not commit the crime charged because I did not possess the requisite mens rea." This is not an affirmative defense whereby the defendant admits or has proved against him the elements of the crime charged, but then raises a claim of justification or excuse. Further, a defendant claiming no mens rea because of mental disorder is not asserting some lesser form of legal insanity, that is, he is not claiming that he is partially or less responsible for the crime charged. Rather, the defendant is straightforwardly denying the prosecution's prima facia case by attempting to cast doubt on the prosecution's claim that a requisite mental element was present at the time of the offense. He is claiming that he is not guilty of that crime at all, although he may be guilty of a lesser crime if all the elements of the latter are proven.

Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75-1 J. CRIM. L. & CRIMINOLOGY 1, 6 (1984). In this opinion I speak in terms of the theory of "diminished capacity" meaning evidence of mental disease or defect, not amounting to legal insanity, offered to negate mental state.

A distinction should also be made between the terms "diminished capacity" and "diminished responsibility." As explained above, in the case of "diminished capacity," evidence of mental abnormality is offered for the purpose of negating culpable mental state. If the evidence successfully negates the mental element, the defendant is not guilty of the offense. By contrast, under the doctrine of "diminished responsibility" the defendant is claiming that due to his mental abnormality, he is not fully responsible for the crime. The theory is that "[e]ven if the technical elements of an offense are satisfied, the defendant is less culpable and should be convicted of a lesser crime, or, at least, should be punished less severely." *Id.* at 20; *see also United States v. Pohlot*, 827 F.2d 889, 903-06 (3rd Cir. 1987) (distinguishing doctrine of diminished responsibility from negation of mental state).

recognizing its validity but holding that it was inapplicable under the facts of the case.

In *Cowles v. State*, 510 S.W.2d 608 (Tex. Crim. App. 1974), the defendant claimed the trial court erred in excluding at the guilt stage on a charge of rape psychiatric testimony that although the defendant knew the difference between right and wrong, he was nevertheless extremely disturbed and mentally ill, with poor judgment and reasoning which impaired his ability to control himself. The Court said that the great weight of authority held that such evidence, falling short of insanity, was not admissible. The Court recognized an exception to this rule, however:

> An exception to this rule is where specific intent is an *element of the offense* for which the accused is being tried, as in the different degrees of murder and the "with intent" crimes.

Id. at 610. The Court held that such evidence was properly rejected in *Cowles* because specific intent was not an element of the crime at issue. *Id.*[2]

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[2] This Court spoke of diminished capacity in another case, *Wagner v. State*, 687 S.W.2d 303 (Tex. Crim. App. 1984). There, the defendant claimed that the exclusion of evidence of a physical condition at the guilt stage was error. The evidence was that shotgun pellets were situated in the defendant's head and he was mentally infirm. In its opinion on original submission, the Court held that the defendant was not entitled to admission of such evidence since he was charged with "intentionally *or knowingly*" causing the victim's death. The crime was therefore not a specific intent crime. *Id.* at 308 (op. on original submission) (citing *Cowles*). The Court granted the defendant's motion for rehearing to reconsider whether the evidence should have been admitted on the issue of intent. *Id.* at 309 (op. on reh'g). On rehearing the defendant pointed out that the trial court in fact charged the jury conjunctively rather than disjunctively on culpable mental state, so that the jury was charged to find that

Most of the state and federal courts recognize that evidence of diminished capacity is admissible to negate mental state. *See, e.g., United States v. Pohlot*, 827 F.2d 889, 897 (3rd Cir. 1987) (under Insanity Defense Reform Act

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the defendant "knowingly and intentionally" caused the death. We agreed with the defendant that the trial court's charge required the jury to find intent. *Id.* at 310-11 (op. on reh'g). However, we declined to accept the argument that the evidence of impaired mental functions was admissible at guilt under the facts of this case. We then inexplicably discussed the doctrine of diminished responsibility, confusing it with the doctrine of diminished capacity. Recognizing that other jurisdictions have held evidence of diminished capacity not amounting to insanity admissible to negate malice aforethought, we stated that although malice aforethought was not an element under § 19.02, when "sudden passion arising from an adequate cause" is raised it could function in the nature of a defense reducing the offense of murder to voluntary manslaughter; accordingly, if the defendant's evidence showed sudden passion, "the doctrine of diminished responsibility would mandate that the evidence be admitted." *Id.* at 311 (op. on reh'g). However, the evidence proffered in *Wagner* did not advance that issue and therefore was properly excluded:

> The import of appellant's proffered evidence is that the injury to his head possibly affects his impulse control, and that he seems to lack emotional contact with his surroundings. All that can be inferred from this evidence is that appellant may be more susceptible than the normal person to acting under the influence of a sudden passion. It does not further the proposition that appellant did in fact act under the influence of such a passion on the night of the offense. . . . Lack of normal impulse control is simply not a circumstance recognized by the Legislature to diminish criminal responsibility of an accused or reduce his crime to a lesser included offense.

Id.

evidence of mental disease or defect less than legal insanity admissible to disprove mens rea), *cert. denied*, 484 U.S. 1011 (1988); *United States v. Frisbee*, 623 F.Supp. 1217 (D.C. Cal. 1985) (under new federal statute and rules, expert testimony on mental disease or defect admissible to negate specific intent); *State v. Burge*, 487 A.2d 532, 539-40 (Conn. 1985) (evidence of mental disease or defect admissible to demonstrate absence of intent, general or specific), *Hendershott v. People*, 653 P.2d 385, 390-93 (Colo. 1982) (violates due process to prohibit evidence of mental disease or defect to negate essential culpability element), *cert. denied*, 459 U.S. 1225 (1983); *State v. McKenzie*, 608 P.2d 428, 452-53 (Mont.) (recognizing viability of diminished capacity defense under former common law and under current statute), *cert. denied*, 449 U.S. 1050 (1980). These courts reason that evidence tending to negate or raise a reasonable doubt as to an element of the State's case is relevant and generally admissible.[3] One court

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[3] As explained by one commentator:

> The "defense" at issue here, is one that at most simply negates a required state of mind. Like all such failure of proof defenses, it contains no special opportunity to exculpate the defendant apart from the standing requirements of the offense definition. . . . As long as a given state of mind is required by the offense definition, any evidence suggesting the absence of that required state of mind would necessarily be relevant and admissible, absent special restrictions, to determine whether all the required elements of the offense were satisfied.

ROBINSON, PAUL H., CRIMINAL LAW DEFENSES § 64(a) at 276 (1984) (footnote omitted).

views barring such evidence as contrary to our adversary system and as a violation of due process:

> A reasonable doubt as to guilt may arise not only from the prosecution's case, but also from defense evidence casting doubt upon what previously may have appeared certain. Denying the defendant any opportunity to controvert the prosecution's case by reliable and relevant evidence of mental impairment, in addition to cutting against our traditional concept of the

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Cowles and *Wagner* indicate that in Texas evidence of mental disease or defect is admissible to negate specific intent, but not lesser culpable mental states. Such a rule, admitting evidence to negate specific intent but not other culpable mental states, has been severely criticized. *Id.* at 277-78 (citing various criticisms of rule restricting such evidence to specific intent crimes). One commentator suggests that a rule of strict relevance would be more logically defensible and effective:

> . . . evidence of mental disease or defect often has little bearing on whether the defendant acted with purpose, knowledge, recklessness, or negligence. The definitions of these terms do not call for a "normative" assessment of blameworthiness; rather they call for specific findings concerning the actor's state of mind with respect to the objective elements of the offense, e.g., was the actor aware that his conduct would cause the death of a human being. Evidence concerning disorders that lead to impaired ability to control conduct, for example, is simply not relevant to the culpability required by such offense definition. A rule of strict relevance may well do more to limit improper psychiatric testimony than an arbitrary and artificial rule based on such distinctions as specific and general intent.

ROBINSON, PAUL H., CRIMINAL LAW DEFENSES § 64(a) at 38-39 (Supp. 1993).

> adversary system, downgrades the prosecution's burden to something less than that mandated by due process of law.

Hendershott, 653 P.2d at 393; *see also Pohlot*, 827 F.2d at 901 (suggesting that a rule barring evidence relevant to mens rea "may be unconstitutional"); *State v. Gonzales*, 681 P.2d 1368, 1372 (Ariz. 1984) (exclusion of evidence of mental disease when relevant to a material issue is a denial of due process).

Accordingly, I join the majority's opinion with the understanding that its holding does not limit the ability of a defendant to offer evidence and argument in support of a theory of diminished capacity.

MALONEY, J.

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